Supreme Court U.S.
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No. 981283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RUSSELL EDWARD DORWART,

Petitioner,

v.

PAUL CARAWAY, individually,
and as a deputy in the Stillwater County Sheriff's Office;
DANNY AMES, individually,
and as a deputy in the Stillwater County Sheriff's Office;
CLIFF BROPHY, individually,
and as Sheriff of Stillwater County, Montana; and
COUNTY OF STILLWATER, State of Montana,

Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of the State of Montana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether state post-judgment execution statutes which (a) do not provide for notice to a judgment debtor of the seizure of the debtor's property; (b) do not provide notice of the availability or existence of state or federal statutory exemptions from execution and where to locate additional information about those exemptions; (c) do not provide any procedure for a debtor to claim those exemptions; (d) do not provide notice of the availability of procedures by which to claim those exemptions; and, (e) do not provide for any postdeprivation hearing on claimed exemptions, violate the Due Process Clause of the Fourteenth Amendment.

2. Whether deputy sheriffs who enter and search a residence and seize property from within without any warrant, consent or exigent circumstances, are entitled to qualified immunity under a 42 U.S.C. 1983 claim of Fourth Amendment violations and Fourteenth Amendment due process violations because they were executing a civil writ of execution.

3. Whether a prevailing party in a 42 U.S.C. 1983 claim may be denied attorneys' fees under 42 U.S.C. § 1988 on the grounds that the unlawful conduct of a county and its officers was pursuant to an unconstitutional state law.

4. Whether a county sheriff and a county are liable under 42 U.S.C. § 1983 for the unlawful actions of deputy sheriffs in entering and searching a residence and seizing property from within, solely on the authority of a civil writ of execution.

PARTIES TO THE PROCEEDING BELOW

All parties to the proceeding below are identified in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Russell Edward Dorwart ("Dorwart") respectfully prays that a writ of certiorari issue to review the decision and order of the Supreme Court of the State of Montana entered in the above case on August 4, 1997, and November 12, 1997.

OPINIONS BELOW

The reported initial decision and order of the Montana Supreme Court is reproduced in the Appendix ("App.") at A-2 through A-61. The order of the Montana Supreme Court on rehearing is reproduced in the Appendix at A-96 through A-98. The citation for the Montana Supreme Court decision, as amended on denial of rehearing, is: *Dorwart v. Caraway*, ___ Mont.___, 966 P.2d 1121 (1998).

The unreported decision and order of the Stillwater County trial court is reproduced in the Appendix at A-62 through A-95.

JURISDICTION

The initial decision and order of the Montana Supreme Court was entered on August 4, 1998. The order denying rehearing was entered on November 12, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1988).

The notifications required by Rule 29.4(c) have been met and the Montana Attorney General has been served, advising that 28 U.S.C. § 2403(b) may apply in this case.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth and Fourteenth Amendments to the Constitution of the United States are reproduced in the Appendix at A-99 through A-100.

42 U.S.C. §§ 1983 and 1988 are reproduced in the Appendix at A-101 through A-102.

The current Montana post-judgment execution statutes are reproduced in the Appendix at A-103 through A-129. The Montana post-judgment execution statutes that were in effect when this case arose in April 1991, are cited as §§ 25-13-101 through 25-13-714 and §§ 25-14-101 through 25-14-108, Montana Code Annotated (hereinafter, "MCA") (1989) and are reproduced in the Appendix at A-130 through A-156. The current post-judgment execution statutes are cited as §§ 25-13-101 through 25-13-714 and §§ 25-14-101 through 25-14-108, MCA (1997). There are no differences in the 1989 and 1997 statutes that are relevant to this case; however, both sets of statutes are reproduced in the Appendix to illustrate that fact.

STATEMENT OF THE CASE

This petition concerns the applicability of the Due Process Clause of the Fourteenth Amendment to state post-judgment execution laws. Debtors have a property interest in the federal and state statutory exemptions from execution that rise to the level of requiring due process protections, according to the decisions of several United States courts of appeals and the Montana Supreme Court in this case. Montana's post-judgment execution statutes are completely void of any such due process protections because they: (a) do not provide for notice to a judgment debtor of the seizure of the debtor's property; (b) do not provide notice of the availability or existence of state or federal statutory exemptions from execution and where to locate additional information about those exemptions; (c) do not provide any procedure for a debtor to claim those exemptions; (d) do not provide notice of the availability of procedures by which to claim those exemptions; and, (e) do not provide for any postdeprivation hearing on claimed exemptions. The Montana Supreme Court initially found that the statutes were unconstitutional, but on rehearing amended its decision and found them unconstitutional only as applied to Dorwart. This case provides the opportunity for this Court to address, for the first time, what

property rights, if any, judgment debtors have in property statutorily exempt from execution.

This petition also concerns the applicability of the qualified immunity defense to 42 U.S.C. § 1983 claims of Fourth and Fourteenth Amendment violations against deputy sheriffs who enter and search a residence and seize personal property found within, all without any warrant, consent, or probable cause and exigent circumstances. The deputies' actions were based solely upon the purported authority of a civil writ of execution which was issued without any hearing and which did not describe any place to be searched and did not describe any particular property to be seized. The court below found that the deputies' actions were not authorized by the writ of execution, but gave the deputies qualified immunity on the grounds that Dorwart did not prove that the law was clearly established that the deputies' conduct was not authorized by the writ of execution. In this case, this Court has the opportunity to clarify existing law as to the availability of qualified immunity in the context of entries into and searches of residences under the purported authority of a civil writ of execution and to clarify who has the burden of proof as to whether the law was clearly established for qualified immunity purposes.

This petition also involves the question of whether a county and county sheriff are liable for the unlawful actions of deputy sheriffs on the grounds of inadequate supervision and training. Discovery in this case revealed that the actions of the deputy sheriffs complained of were done in the usual and customary manner of the Stillwater County Sheriff's Office and that the Sheriff's Office had provided no guidance to its deputies in the service and execution of civil writs of execution. The court below found the County and the County Sheriff not liable on summary judgment.

Lastly, this petition concerns the question of whether attorneys' fees may be denied to a prevailing plaintiff in a 42 U.S.C.

§ 1983 action on the grounds that the defendants in the action were following an unconstitutional state law. The court below found that the deputies were following Montana's unconstitutional post-judgment execution statutes when they entered and searched Dorwart's residence and seized personal property found within and on that basis ruled that "special circumstances" existed which would make an award of attorneys' fees under 42 U.S.C. § 1988 "unjust." This case provides this Court an opportunity to provide guidelines for what constitutes "special circumstances" to justify denial of attorneys' fees to a prevailing party under 42 U.S.C. § 1988.

A. The Montana Post-judgment Execution Statutes

Pursuant to Montana's post-judgment execution statutes, a party who receives a judgment for money may have a writ of execution issued to enforce the judgment. §§ 25-13-101(1) and 25-13-201, MCA.[1] App. A-106, 109. The writ must be satisfied by levy upon and sale of the debtor's property. *See* §§ 25-13-304 and 25-13-402, MCA. App. A-110, 112. All property not exempt by law is subject to execution. §§ 25-13-501, MCA. App. A-113. The statutory exemptions are found in §§ 25-13-601 through 25-13-615, MCA. App. A-115 through A-120. The property seized from Dorwart was exempt pursuant to § 25-13-609, MCA. App. A-117.

Section 25-13-606, MCA (App. A-115) provides that a Montana resident is "entitled" to the statutory exemptions. Section 25-13-609 (App. A-117) provides the same thing. The Montana Supreme Court concluded that debtors have a property interest in the statutory exemption rising to the level of requiring due process protections under the United States Constitution. App. A-30-31.

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[1] Unless otherwise indicated, when the Montana statutes are cited, the 1989 and 1997 versions are identical.

The Montana Supreme Court reached several conclusions regarding Montana's post-judgment execution statutes. The statutes do not provide for service of a writ of execution upon a judgment debtor nor any other method of notifying a debtor that property has been seized to satisfy a judgment. App. A-36. The writs of execution themselves do not state what property is exempt or explain where a debtor could find out that information. App. A-37. The statutes do not require that any information regarding exemptions be given to judgment debtors. App. A-38. The statues also do not provide any means to claim statutory exemptions and for those claims to be decided by a court. App. A-38-39. The writ issued in this case said nothing about any such process or procedure. App. A-39. The statutes have no provision for giving a judgment debtor notice of the availability of any procedures for claiming the exemptions or having a hearing on any such claims. App. A-39.

Thus, the Montana post-judgment execution statutes, in the form they are now in and in the form they were in when this case arose in April 1991, (a) do not provide for notice to a judgment debtor of the seizure of the debtor's property; (b) do not provide notice of the availability or existence of statutory exemptions from execution and where to locate additional information about those exemptions; (c) do not provide any procedure for a debtor to assert those exemptions; (d) do not provide notice of the availability of procedures by which to claim those exemptions; and, (e) do not provide for any postdeprivation hearing on claimed exemptions. App. A-103 through A-156.

B. The Proceedings Below

Russell Edward Dorwart is a carpenter who resides in Stillwater County, Montana. On February 19, 1991, two default judgments were obtained against him in the Stillwater County Justice Court, in the total of $1,404.28. On March 12, 1991, the Stillwater County Justice of the Peace issued a writ of execution to the

Sheriff of Stillwater County, directing the Sheriff to " . . . make said sum due . . . to satisfy the said judgment out of the personal property of the said debtor not exempt from execution . . ." App. A-75. On April 9, 1991, the Justice of the Peace issued another writ, with identical directions, thus issuing writs for both default judgments. The writs failed "to delineate the property sought or the place to be searched with any specificity." App. A-21. On April 11, 1991, two deputies of the Stillwater County Sheriff's Office, Respondents Paul Caraway and Danny Ames, arrested and incarcerated Dorwart for driving under the influence of alcohol and seized Dorwart's truck under one of the writs of execution. After he incarcerated Dorwart, Ames asked him, "Is your house locked?" and Dorwart replied that one door was locked and another wasn't. App. A-3. Armed with no more than the writs of execution, the two deputies then went to Dorwart's home, entered it, searched it, and seized numerous items of personal property, some belonging to Dorwart and some to other persons. Everything the deputies seized, including the pickup, was exempt from execution under Montana's statutory exemptions. The deputies seized such items as a set of elk horns, a cassette player, a television and a bear rug.

After he visited with an attorney some days later, Dorwart filed affidavits of exemption with the Justice Court, stating that all of the items seized were exempt from execution. This procedure is not statutory but is simply a means in Montana of trying to retrieve exempt property that has been seized under a writ of execution. Some five months later, on September 30, 1991, the Justice Court finally issued an order that all property seized from Dorwart's home be returned to him and to the other persons owning some of the property. Shortly thereafter, Dorwart went to the Stillwater County jail and retrieved his property.

At no time was Dorwart ever advised by anyone besides his lawyer that there were statutory exemptions to execution, what they were, how to claim them or who to see to claim them. Montana has no such procedures or requirements in its statutes.

On April 5, 1993, Dorwart filed a complaint in the Montana Thirteenth Judicial District Court for Stillwater County alleging, among other things, federal § 1983 claims for (a) violations of his Fourth Amendment rights; (b) violation of due process of law; (c) and a claim for attorneys' fees under 42 U.S.C. § 1988. App. A-165 through A-168. On April 1, 1994, Dorwart filed an amended complaint which differed from his original complaint in two respects: (1) it added a cause of action for a declaratory judgment to declare Montana's post-judgment execution statutes to be in violation of the Fourteenth Amendment on due process grounds and (2) it added a claim that those statutes were also unconstitutional as applied to Dorwart. App. A-180 through A-184. The Defendants in both complaints were the two deputies, Ames and Caraway, Cliff Brophy, the Stillwater County Sheriff, and Stillwater County.

On October 14, 1993, Dorwart filed his motion for partial summary judgment, asking for summary judgment on all of his federal claims. App. A-185 through A-187. The trial court granted the Respondents' summary judgment motion and denied all of Dorwart's summary judgment motion except for ruling that Montana's post-judgment execution statues violated Dorwart's federal right to due process of law. App. A-62 through A-95. Dorwart thereafter timely filed his notice of appeal, appealing the trial court's decision to the Montana Supreme Court. App. A-188 through A-190. Respondents filed a cross-appeal, appealing the trial court's decision that the statutes were unconstitutional on federal due process grounds. App. A-5.

On appeal, the Montana Supreme Court, in a 5-2 decision, affirmed in part, reversed in part, and remanded the case to the trial court. However, all federal claims were disposed of by the court. On the Fourth Amendment claim, the Montana Supreme Court ruled that the deputies violated Dorwart's Fourth Amendment rights by entering into and searching his home and seizing property from within. The court stated that, " [w]rits of execu-

tion do not authorize the entry into and search of a private home. . ." App. A-21. However, the court also found that the deputies were entitled to qualified immunity on the Fourth Amendment claim because, the court stated, Dorwart did not prove that the law was clear that a deputy could not enter a residence, search it and seize property from within under the authority of a civil writ of execution. App. A-46-47.

Applying the test articulated in *Matthews v. Elderidge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the court also found that Montana's post-judgment execution statutes were unconstitutional on due process grounds. However, the court, without explanation, amended that portion of its decision to state that the statutes were unconstitutional only as applied to Dorwart, but not unconstitutional on their face. App. A-97.

As far as whether the deputies were entitled to qualified immunity on Dorwart's federal due process claim, the court ruled that qualified immunity did not apply because Dorwart did not seek monetary damages on that claim. App. A-44. Thus, the court never reached the question of whether the deputy sheriffs were entitled to qualified immunity on the due process claim. However, Dorwart did seek monetary damages on that claim. App. A-179, 183. That ruling, in effect left Dorwart with no opportunity for recovery on his claim of damages for violation of his federal due process rights.

The court also found no liability on the part of the Stillwater County Sheriff or Stillwater County, finding no policy or custom of the County to cause the constitutional deprivations and no failure to train or supervise the deputies. This conclusion was reached in spite of the fact that, as the dissent noted, in responses to interrogatories, each defendant stated under oath that the actions complained of were "the usual and customary manner of performing a seizure on a writ of execution in the County of Stillwater, Montana." App. A-59.

Lastly, the court denied Dorwart's claim for attorneys' fees under 42 U.S.C. § 1988. Even though the court found that Dorwart was a "prevailing party," it concluded that "special circumstances" in the case rendered a fee award "unjust." The "special circumstances" were that the deputies were enforcing unconstitutional state laws. The court recognized that "a successful § 1983 claimant may be awarded attorney's fees under § 1988 regardless of the fact that qualified immunity prevents liability for monetary damages." App. A-53. However, it then ruled that:

> Where a § 1983 claim is derived from the actions of a county and its officers in enforcing or following state laws and, thereby, effectuating state policy, that county and its officers should not be subject to liability for attorney's fees resulting from the claim.

App. A-53. In so ruling, the court cited *Blanchard v. Bergeron*, 489 U.S. 87, 89, 109 S.Ct. 939, 942, 103 L.Ed.2d 67, 72 (1989), which in turn had cited *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263, 1266 (1968).

REASONS FOR GRANTING THE WRIT

I. CONSTITUTIONALITY OF MONTANA POST-JUDGMENT EXECUTION STATUTES

A. THIS COURT HAS NEVER RULED ON THE PROPERTY RIGHTS JUDGMENT DEBTORS MAY HAVE IN PROPERTY STATUTORILY EXEMPT FROM EXECUTION.

To begin with, the statutory exemptions from execution include important federal benefits such as veterans and social security benefits. § 25-13-608(1)(b), (c), (2), MCA. App. A-116. They also include such necessities as child support and disability benefits. § 25-13-608(d) and (f), MCA. App. A-116. In Montana, they also include the debtor's interest, up to $1,200.00, in a motor vehicle, up to $3,000.00 in tools and implements of the trade of the judgment debtor, and up to $4,500.00 in household furnishings. § 25-13-609(1), (2) and (3), MCA. App. A-117.

This author has been unable to find a decision of this Court which discusses what property rights, if any, judgment debtors have in statutory exemptions from execution. One case from this Court deals with due process rights in the context of a writ of garnishment, but does not deal with statutory exemptions from execution. In *Endicott-Johnson Corp. v. Encyclopedia Press*, 266 U.S. 285, 45 S.Ct. 61, 69 L.Ed.2d 288 (1924), this Court held that due process of law does not require a judgment debtor be given notice and an opportunity to be heard before the issuance and execution of a writ of garnishment. Since the debtor had a chance to be heard in the underlying case, the debtor had to take notice of what would happen after judgment was entered and no further notice or hearing was necessary. *Endicott-Johnson*, 266 U.S. at 288. While somewhat related to the issues in the instant case, and relied on heavily by Respondents in the proceedings below, and while it has never been overruled, *Endicott-Johnson* has been either factually distinguished or found to be of ques-

tionable viability to the federal courts which have ruled on debtors' property rights in statutory exemptions. *Aacen v San Juan County Sheriff's Dept.*, 944 F.2d 691, 695 (10th Cir. 1991) (citations omitted); *Dionne v. Bouley*, 757 F.2d 1344, 1351 (1st Cir. 1985); *Finberg v. Sullivan*, 634 F.2d 50, 56-57 (3rd Cir. 1980); *Deary v. Guardian Loan Co., Inc.*, 534 F.Supp. 1178, 1185-86 (S.D.N.Y. 1982); *Kirby v. Sprouls*, 722 F.Supp. 516, 520 (C.D. Ill. 1989). Thus, this case presents this Court with the opportunity, for the first time, to state what property rights, if any, judgment debtors have in statutory exemptions from execution. As evidenced by the Montana post-judgment execution statutes, these exemptions not only represent important rights, but are vulnerable to statutory schemes that offer them no protection whatsoever. Dorwart was without several items of his exempt personal property for some five months due to the constitutional deficiencies of these statutes.

Besides the federal cases cited above, other cases holding that statutory exemptions require due process protections and finding execution statutes unconstitutional on due process grounds include; *McCahey v. L.P. Investors*, 774 F.2d 543 (2nd Cir. 1985); *Betts v. Tom*, 431 F.Supp. 1369 (D. Hawaii 1977); *Neely v. Century Finance Co. of Arizona*, 606 F.Supp. 1453 (D.Ariz. 1985); *Reigh v. Schleigh*, 595 F.Supp. 1535 (D.Md. 1984); *Clay v. Fisher*, 584 F.Supp. 730 (S.D.Ohio 1984); *Harris v. Bailey*, 574 F.Supp. 966 (W.D.Va. 1983); *Cole v. Goldberger, Pedersen & Hochron*, 95 Misc. 2d 720, 410 N.Y.S.2d 950 (1978). Most, if not all, of these cases, and the Montana Supreme Court in the instant case, applied the balancing test articulated in *Matthews v. Elderidge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

B. THE MONTANA POST-JUDGMENT EXECUTION STATUTES ARE UNCONSTITUTIONAL ON THEIR FACE.

The Montana Supreme Court concluded in its initial opinion that the Montana post-judgment execution statutes were uncon-

stitutional. App. A-43. However, the court amended its decision on rehearing to conclude that the statutes were unconstitutional "as applied in this case." App. A-97. Given the constitutional deficiencies of these statutes, they cannot and should not be salvaged. They offer no protections of rights which the Montana Supreme Court itself found to be deserving of due process protections. As this Court has stated, "Our precedents establish the general rule that individuals must receive notice and an opportunity to be heard before the Government deprives them of property." *United States v. James Daniel Good Real Property et al.*, 510 U.S. 43, 48, 114 S.Ct. 492, 498, 126 L.Ed.2d 490 (1993) (citations omitted). "The right to prior notice and a hearing is central to the Constitution's command of due process." *Id.*, 510 U.S. at 53, 114 S.Ct. at 500. Again, the property interest at stake here is important. A money judgment against a debtor does not give the creditor ownership of any particular property of the debtor, but rather the opportunity to satisfy the judgment from non-exempt property. As the Tenth Circuit stated, "[T]hese interests [of a judgment creditor] do not erase all consideration for the debtor with respect to property which the law forbids the creditor to attach in satisfaction of the debt." *Aacen*, *supra*, 944 F.2d at 696 (citations and internal quotation marks omitted).

II. THE QUALIFIED IMMUNITY OF THE DEPUTY SHERIFFS

The issue of whether an officer's entry into a private residence to execute on a writ of execution violates Fourth Amendment rights, where the sole authority for the entry is the writ of execution itself, is one of first impression in Montana. App. A-14. The Montana Supreme Court found that the writs "simply did not sufficiently limit the deputies' discretion in executing the writs to satisfy the search and seizure provisions of the Fourth Amendment . . ." and that the deputies violated Dorwart's Fourth Amendment rights. App. A-21. The court subsequently concluded:

> [u]nder the law as it existed at the time Ames and Caraway entered Dorwart's home and levied upon his property, it was not clearly established that the writs of execution pursuant to which the deputies acted did not, in and of themselves, authorize entry into a private residence or that their entry pursuant only to the writs of execution violated Dorwart's right to be free from unreasonable searches and seizures. Because Dorwart has not satisfied his initial burden of proving that the right which the deputies violated was clearly established at the time of the violation, we need not address whether it was objectively reasonable for Ames and Caraway to believe their conduct was lawful. *See Hamilton*, 981 F.2d at 1066. We hold that Caraway and Ames are entitled to qualified immunity from individual liability for Dorwart's § 1983 search and seizure claim.

App. A-46-47. The court based this conclusion on *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (hereinafter "*Anderson*"). However, overlooked by the Montana Supreme Court is the fact that Ames and Caraway are sued in both their individual and official capacities. App. A-169. In *Anderson*, this Court ruled that a federal law enforcement officer who participates in a search that violates the Fourth Amendment may not be held *personally* liable for money damages so long as a reasonable officer could have believed that the search complied with the Fourth Amendment. "Qualified immunity protects an official from personal liability." *Jackson v. Galan*, 868 F.2d 165, 168 (5th Cir. 1989). "In an official-capacity action, these defenses [qualified immunity] are unavailable." *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 3105 (1985) (citations omitted). The Montana Supreme Court simply did not discuss the liability of the deputy sheriffs in their official capacities.

Another reason for this Court to grant this petition on this issue is that a reasonable officer simply could not have believed that

the deputies' entry into and search of Dorwart's home was lawful "in light of clearly established law and the information the officers possessed." *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3040. The court below found that, "[n]either the writs of execution themselves, nor the post-judgment execution statutes pursuant to which the writs were issued, expressly directed or authorized the deputies to enter Dorwart's private residence to effectuate the seizure of his property." App. A-12. The court also stated that, "[n]othing in the post-judgment execution statutes expressly authorizes the entry into a private home for the purpose of executing a writ of execution." App. A-20. In further discussing the writs of execution, the Montana Supreme Court stated:

> Moreover, neither the justice court civil procedure rules nor the post-judgment execution statutes require any substantive impartial review by a court regarding whether a writ of execution should be issued. Nor does the record reflect any applications for the writs at issue here based on affidavit or other testimony describing the place to be searched, the property sought and the necessity of the search. Likewise, the record is devoid of any indication that the Justice of the Peace made an objective determination that there was probable or reasonable cause to believe the search of Dorwart's home was justified under the circumstances. Finally, the writs themselves do not constitute a suitably restricted search warrant because they fail to delineate the property sought or the place to be searched with any specificity.

App. A-21. Thus, the writs could not reasonably have lead the deputies to believe their actions were lawful. In *Anderson*, the FBI agent who entered the Creighton's home " . . . believed that Vadaain Dixon, a man suspected of a bank robbery committed earlier that day, might be found there." *Anderson*, 483 U.S. at 636, 107 S.Ct. at 3037. In the instant case, there is no evidence

whatsoever that the deputies had any reason to believe that they could find exempt property in Dorwart's home to seize under the writ of execution. The deputies had absolutely no information in their possession that would have lead a reasonable officer to believe the deputies' conduct was objectively reasonable.

The Montana Supreme Court relied on a single ninety-six years old case to support its conclusion that Dorwart failed to prove the deputies violated clearly established law. App. A-45-46. In *Ramsey v. Burns*, 27 Mont. 154, 69 P. 711 (1902), the court ruled that a writ of attachment gives an official "the right to enter a business place against the will of the occupant, permission having been asked and refused, and to seize property therein belonging to the occupant and subject to levy." *Ramsey*, 27 Mont. at 156, 69 P. at 712. Reliance on that case is inappropriate for at least two reasons: first, as the dissent below points out, the case "had nothing to do with constitutional issues in the first place," App. A-60; second, federal law should govern whether a Fourth Amendment violation also violates clearly established law. "Under the objective test, an official is charged with knowledge of controlling Supreme Court and Ninth Circuit precedent." *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1483 (9th Cir. 1992). In that regard, in *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), this Court held that a homeowner has a Fourth Amendment right to insist that municipal health inspectors obtain a search warrant to search his home, stating, "that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual . . ." *Camara*, 387 U.S. at 534, 87 S.Ct. 1733. Also, in *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977), this Court held that a non-exigent, warrantless entry onto a taxpayer's private property to

seize assets in satisfaction of assessed tax deficiencies violates the warrant requirement of the Fourth Amendment. *Id.*, 429 U.S. at 354. The validity of the tax assessments established only probable cause for the seizures and did not establish the reasonableness of the entry onto private property without a warrant. *Id.*, 429 U.S. at 358. While not dealing specifically with writs of execution, these two cases clearly hold, in a civil context, that warrantless administrative searches of private property violated the Fourth Amendment. The court below dismisses those cases because, " . . . it would not have been clear that we would interpret those cases as supporting our conclusion that the deputies' actions violated Dorwart's constitutional rights." App. A-46. " *Camara* and *G.M. Leasing*," the court continued, "while providing guidance in addressing the scope of warrantless administrative searches and seizures, did not directly address actions taken pursuant to a writ of execution. Indeed, in neither case did there appear to be any type of judicial authorization for entry into the complainant's premises." App. A-46. However, the court also found that the writs of execution in the instant case also did not authorize entry into Dorwart's home. App. A-21. Further, the court's reasoning is contradictory to the statement in *Anderson* that, "This is not to say than an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . ." *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039.

In *Anderson*, this Court did not find qualified immunity for the FBI agent; rather, it found that he should "be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing warrantless searches, he could, as a matter of law, reasonably have believed that the search of the Creighton's home was lawful." *Id.*, 483 U.S. at 641, 107 S.Ct. at 3040. "[o]n remand," this Court stated, "it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable

officer could have believed lawful." *Id.*, 483 U.S. 646, 107 S.Ct. 3042, FN6. This Court did not specifically say who was given the burden on remand, whether the Creightons had to establish that Anderson's actions were not those of a reasonable officer, or whether Anderson did. The Court points out that the fact that Anderson's search was warrantless and not supported by probable cause and exigent circumstances does not lead immediately to a conclusion that "the search was objectively legally unreasonable." *Id.*, 483 U.S. at 640, 107 S.Ct. at 3038. This language appears to place the burden on the Creightons to establish the unreasonableness of Anderson's search. But the Court subsequently states that, "Anderson be permitted to argue that he is entitled to summary judgment on the ground that . . .he could, as a matter of law, reasonably have believed that the search . . . was lawful." *Id.*, 483 U.S. at 641, 107 S.Ct. at 3040. That appears to place the burden on Anderson. The issue of who has the burden is important in the instant case because the Montana Supreme Court placed the entire burden on Dorwart, stating, " . . . Dorwart must demonstrate that, at the time the deputies entered his home, it was clearly established that the writs of execution did not authorize their entry in the absence of a warrant or an established exception to the warrant requirement and that, as a result, they violated his right to be free from unreasonable searches and seizures." App. A-45. The court then stated:

> Because Dorwart has not satisfied his initial burden of proving that the right which the deputies violated was clearly established at the time of the violation, we need not address whether it was objectively reasonable for Ames and Caraway to believe their conduct was lawful. *See Hamilton*, 981 F.2d at 1066. We hold that Caraway and Ames are entitled to qualified immunity from individual liability for Dorwart's § 1983 search and seizure claim.

App. A-47. In other words, the Montana Supreme Court interpreted *Anderson* to mean that Dorwart had to prove that it was

clearly established that the writs of execution and Montana's post-judgment execution statutes did not render the deputies' entry and search objectively reasonable. It is respectfully submitted that that is not a correct interpretation of *Anderson*. The Creightons argued, and the Ninth Circuit ruled, that a warrantless search without probable cause and exigent circumstances is enough to defeat a claim of qualified immunity. That is not what Dorwart is arguing. Dorwart is arguing that, once he has proven a violation of a clearly established constitutional right, which he has, he does not have the total burden to prove that the deputies' actions were not "objectively legally reasonable." At the minimum, to obtain qualified immunity, the deputies should have to do more than point out the lack of case law stating their specific conduct was not objectively legally reasonable.

There is a lack of uniformity in the United States courts of appeals on the issue of who has the burden to establish whether a search is objectively legally reasonable in order to determine whether qualified immunity applies. The Sixth Circuit has ruled that, "Even though qualified immunity is an affirmative defense, the district court should not require the defendant to prove . . . that the conduct plaintiff alleged did not violate clearly established law." *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987). In a First Circuit case, the court reversed and remanded a case alleging Fourth Amendment violations on the basis that a jury instruction given by the district court used potentially misleading language that could have led the jury to believe that the plaintiff had a heightened standard of proof; the district court had instructed the jury that the plaintiff had to prove that the elements of the Fourth Amendment violations were "clearly evident" to a reasonable police officer. *Tatro v. Kervin*, 41 F.3d 9 (1st Cir. 1994). In a Ninth Circuit case, the court ruled that the defendant was not entitled to qualified immunity because the defendant had the burden of showing that a reasonable officer in his position could have believed that his conduct was lawful and he did not meet that burden. *DeNieva v. Reyes*, 966 F.2d 480 (9th Cir. 1992).

The Tenth Circuit has ruled that "[w]here the affirmative defense of qualified immunity is properly raised, it is the plaintiff's burden to convince the court that the law is clearly established." *Lutz v. Weld County School District No. 6*, 784 F.2d 340, 342-43 (10th Cir. 1986). The Eleventh Circuit formulated a more complex rule, ruling that, first, the defendant must prove that he or she acted within the scope of his or her discretionary authority. Then the plaintiff must show that the defendant violated clearly settled law. The second step has two parts: first the court must determine whether the applicable law was clearly established at the relevant time, and then the court has to decide whether there is a genuine issue of material fact regarding the violation of clearly settled law. *Hutton v. Strickland*, 919 F.2d 1531 (11th Cir. 1990). In any event, there is no evidence in the instant case to establish that the deputies' conduct was objectively legally reasonable. Dorwart should not have to prove that the conduct was not objectively legally reasonable. As the dissent in the court below pointed out, the Montana Supreme Court's decision imposes "an impossible burden on the plaintiffs" which is that, " . . . the plaintiffs have to prove a negative in order to establish that they clearly had a right which the majority initially concedes is clearly established." App. A-59.

III. THE LIABILITY OF THE SHERIFF AND THE COUNTY

The court below ruled the Sheriff and the County were not liable because Dorwart did not establish that the deputies' conduct was pursuant to the County's customary procedures. App. A-48 - 50. However, as the dissent noted:

> In this case, in response to written interrogatories, each defendant answered that the actions complained of (i.e., the illegal search of Dorwart's home and seizure of property found therein) were "the usual and customary manner of performing a seizure on a writ of execution in the County of Stillwater, Montana."

App. A-59. That there is evidence of only one occasion of such an entry and search, i.e., into Dorwart's home, is not grounds to find the Sheriff and the County not liable. *Pembaur v. City of Cincinnati*, 475 .S. 469, 479, 106 S.Ct. 1292, 1298 (1985). The Sheriff and the County answered the interrogatory referred to by the dissent with the same answer as the other defendants. As the policy maker, the Sheriff's actions and inactions " . . . must necessarily be considered those of one whose edicts or acts may fairly be said to represent official policy for which the municipality may be held responsible." *McKinley v. City of Elroy*, 705 F.2d 1110, 1116 (9th Cir. 1983). Of course, any immunity of the deputies does not relieve the County of liability. *Evers v. County of Custer*, 745 F.2d 1196, 1200 (9th Cir. 1984). The "deliberate indifference" the court below found lacking could not have been established more clearly in the Respondents' answers to interrogatories.

Lastly on this question, the court below found that "[t]he only § 1983 claim on which Dorwart prevailed is his claim that Caraway and Ames violated his Fourth Amendment rights . . ." and reviewed the liability of the Sheriff and the County in that context. As noted above, the court below simply did not deal with Dorwart's federal due process claim, other than to mistakenly find that Dorwart did not seek money damages for that claim and then to find that qualified immunity did not apply. App. A-44.

IV. THE DENIAL OF ATTORNEYS' FEES DUE TO "SPECIAL CIRCUMSTANCES"

This question may present the clearest, if not the strongest, case for this Court to grant this petition. The Montana Supreme Court recognized that a successful § 1983 claimant may be awarded attorney's even when qualified immunity is given. App. A-53. It also recognized that "special circumstances" may render such an award "unjust." App. A-53. The court then denied attorneys' fees because the deputies were "enforcing or

following state laws and, thereby effectuating state policy . . ." App. A-53. This ruling is in direct conflict with decisions of several United States courts of appeals.

In *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir. 1979), (hereinafter, "*Johnson*"), plaintiffs filed a civil rights action challenging the constitutionality of a Mississippi statute which provided that students living one mile or more from their attendance centers were entitled to state financed transportation; however, students living within the corporate limits of a municipality and attending school within those corporate limits were not entitled to free transportation, no matter how far they lived from school. The federal district court declared the statute unconstitutional and enjoined its enforcement. *Johnson*, at 635-636, and awarded attorneys' fees. Defendants in *Johnson* argued that "special circumstances" existed to deny the prevailing plaintiffs attorneys' fees. The "special circumstances" upon which they relied included "that they believed the challenged statute was constitutional . . ." and that their " . . . conduct was required by the Mississippi Legislature." *Id.*, at 637. The Fifth Circuit responded that, "Defendants' 'good faith' belief that the statute was valid is not controlling." *Id.*, at 637 (citation omitted). This has remained the rule in the Fifth Circuit. *Robinson v. Kimbrough*, 620 F.2d 468, 478 (5th Cir. 1980) (citations omitted) (noting at 478, "Other courts have limited this exception to circumstances beyond the defendants' control or to attacks by plaintiffs on antiquated statutes"); *Riddell v. The National Democratic Party*, 624 F.2d 539, 545 (5th Cir.1980) ("State officials cannot show special circumstances sufficient to prevent an award of attorneys' fees merely because the officials enforced the statute in good faith . . ."), *on remand to* 545 F.Supp. 539 (S.D.Miss. 1982), *aff'd in part, rev'd in part on other grounds*, 712 F.2d 165 (1983); *International Oceanic Enterprises v. Menton*, 614 F.2d 502, 504 (5th Cir. 1980); *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board*, 643 F.2d 1034, 1040 (1981); *Ellwest*

Stereo Theatre, Inc. v. Jackson, 653 F.2d 954, 956 (5th Cir. 1981) (holding that even relying on an unconstitutional statute that a state supreme court ruled was valid was not a "special circumstance"); *Jackson v. Galan, supra,* (stating at 168, "This court has affirmed attorney's fees awarded under § 1983 against officials enforcing an unconstitutional statute, even though the officials claimed to have no discretion to act otherwise.").

The rule is the same in the First Circuit, where the court has ruled that the fact that state law required defendants' actions "under threat of criminal penalties" was not a "special circumstance" to deny attorneys' fees. *Coalition For Basic Human Needs v. King*, 691 F.2d 597, 602 (1st Cir. 1982); *See also Venuti v. Riordan*, 702 F.2d 6, 8 (1st Cir. 1983); *See, also, Williams v. Hanover Housing Authority*, 113 F.3D 1294, 1301-02 (1ST Cir. 1997) (noting at 1301-02, "The circuits are in agreement, however, that defendants' good faith reliance even on settled law (which was scarcely the case here) is not a 'special circumstance' warranting a denial of attorneys' fees under § 1988.")

The Seventh Circuit has ruled that state officials who were enforcing federal regulations were not entitled to avoid liability for attorneys' fees under § 1988 under the "special circumstances" argument. *Crosby v. Bowling*, 683 F.2d 1068, 1072-1074 (7th Cir. 1982). That circuit has also held that good faith enforcement of state laws is not a "special circumstance." *Lampher v. Zagel*, 755 F.2d 99, 101-02 (7th Cir. 1985).

In the Tenth Circuit, good faith adherence to an invalid city ordinance is not a "special circumstance" to deny attorneys' fees under § 1988. *Love v. Mayor, City of Cheyenne, Wyoming*, 620 F.2d 235, 236 (10th Cir. 1980). The Tenth Circuit has also relied upon language in *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641 (1980), to find that good faith adherence to state laws is not a "special circumstance" to deny attorneys' fees

under § 1988. *Kansas Congressional Districts Reapportionment Cases v. Brier*, 745 F.2d 610, 612 (10th Cir. 1984). In *Consumers Union* this Court stated that, "Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or an injunction." *Consumers Union*, 446 U.S. at 739, 100 S.Ct. at 1978. That quote from *Consumers Union* was relied on to the same affect by the Seventh Circuit in *Crosby v. Bowling*, *supra*, 683 F.2d at 1073.

The Eleventh Circuit has ruled that the fact that a state acted pursuant to a federal regulation was not a "special circumstance" upon which to deny attorneys' fees under § 1988. *Martin v. Heckler*, 773 F.2d 1145, 1150 (11th Cir. 1985). The Eleventh Circuit, too, cited *Consumers Union*, *supra*, as authority for its ruling. *Martin*, 773 F.2d at 1150.

The Montana Supreme Court's decision on this question also directly contradicts a decision of the highest court of at least one other state. In *Cepulonis v. Registrars of Voters of Worcester*, 396 Mass. 808, 811, 488 N.E.2d 1166, 1168 (1986), the court stated that, "[a]dherence to statutory requirements does not relieve the registrars from liability for attorneys' fees under § 1988." (citing *Consumers Union*, *supra*).

It is also respectfully submitted that this Court should use the instant case as an opportunity to provide guidelines as to what may or may not constitute "special circumstances" to justify denial of attorneys' fees to a successful plaintiff, particularly under 42 U.S.C. § 1988. The case most often cited regarding such "special circumstances" is *Newman v. Piggie Park Enterprises, Inc.*, *supra*, in which the Court stated, after discussing the Civil Rights Act of 1964, "It follows that one who succeeds in obtaining an injunction under that Title should ordinarily recover an attorney's fee unless special circumstances would

render such an award unjust." *Newman*, 390 U.S. at 402, 88 S.Ct. at 966. In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933 (1983), the Court discussed the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, noting the legislative history discussed the "special circumstances" provision from *Newman*. *Hensley*, 461 U.S. at 429, 103 S.Ct. at 1937. *Blanchard v. Bergeron*, 489 U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1983), cited by the Montana Supreme Court in its decision herein, (App. A-53), also mentions the "special circumstances" exception to an award of attorneys' fees to a successful plaintiff pursuant to § 1988, citing *Newman* and *Hensley*. *Blanchard*, 489 U.S. at 89, 109 S.Ct. at 942, FN1. Of course, the "special circumstances" exception appears in numerous other cases decided by this court. *Northcross v. Board of Education of the Memphis City Schools*, 412 U.S. 427, 428, 93 S.Ct. 2201, 2202 (1973) (per curiam); *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 416-14, 98 S.Ct. 694, 698 (1978); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63, 68, 100 S.Ct. 2024, 2030, 2033 (1980); *Kentucky v. Graham*, *supra*, 473 U.S. at 164, 105 S.Ct. at 3104 (1985); *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522-23, 114 S.Ct. 1023, 1027 (1994). However, in none of these cases does the Court provide guidelines for what may constitute such "special circumstances."

While the United States circuit courts of appeals appear to be consistent that following a state law is not a "special circumstance," it is not so clear that there is any other consistency in determining what is or is not a "special circumstance." The Ninth Circuit, for example, has used a two-part test to determine whether "special circumstances" exist, (1) whether or not awarding fees would further the congressional purpose of the underlying act involved and (2) "the balance of the equities." *Abu-Sahyun v. Palo Alto Unified School District*, 843 F.2d 1250, 1252 (9th Cir. 1988). It has also used what appears to be a "totality of the circumstances" test for that same determination. *Thorsted v. Munro*, 75 F.3d 454, 456 (9th Cir. 1996).

Lastly on this question, even if following an invalid state law constitutes a "special circumstance" exception to awarding successful plaintiffs attorneys' fees under 42 U.S.C. § 1988, there is nothing in the Montana statutes that suggest, much less mandate, that deputy sheriffs enter and search private homes to seize property under a writ of execution to satisfy a judgment. This was specifically recognized by the Montana Supreme Court in its decision. App. A-12, 20. The court also found it noteworthy that the deputies' actions "were pursuant to Stillwater County's customary procedures for the execution of a writ issued in conformance with the Montana execution statutes."[2] App. A-53-54. In reaching its decision on this question, the court below completely ignored the purposes behind 42 U.S.C. § 1988, not to mention what appears to be clear and consistent law in the United States courts of appeals and in Massachusetts. The court's decision on this question should not be allowed to stand.

CONCLUSION

For these reasons a writ of certiorari should issue and the decision and order of the Supreme Court of the State of Montana should, in all above respects, be reversed.

Respectfully submitted,

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Date: February 10, 1999

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[2] If that is true, then the Sheriff and the County should have been found liable.

APPENDIX

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APPENDIX A

No. 95-446

IN THE SUPREME COURT
OF THE STATE OF MONTANA

1998 MT 191

RUSSELL EDWARD DORWART
and HARRY DORWART,
Plaintiffs, Appellants and Cross-Respondents,

v.

PAUL CARAWAY, individually and as a deputy in the Stillwater County Sheriff's Office;
DANNY AMES, individually and as a deputy in the Stillwater County Sheriff's Office;
CLIFF BROPHY, individually and as Sheriff of Stillwater County, Montana;
and COUNTY OF STILLWATER, State of Montana,
Defendants, Respondent and Cross-Appellants.

APPEAL FROM:
District Court of the Thirteenth Judicial District,
In and for the County of Stillwater,
The Honorable Maurice R. Colberg, Judge presiding.

[Filed: August 4, 1998]

COUNSEL OF RECORD:
For Appellants:

Gary R. Thomas (argued); Thomas Law Office, Red Lodge, Montana

For Respondents:

Steven R. Milch (argued); Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Montana

For Amicus:

Hon. Joseph P. Mazurek, Attorney General; Clay R. Smith, Solicitor, Helena, Montana

Argued: June 12, 1997
Submitted: July 15, 1997
Decided: August 4, 1998

Filed:

/s/ Ed Smith
Clerk

Justice Karla M. Gray delivered the Opinion of the Court.

¶1 Plaintiffs Russell Edward Dorwart (Dorwart) and Harry Dorwart appeal from the judgment entered by the Thirteenth Judicial District Court, Stillwater County, on its order granting partial summary judgment to defendants Paul Caraway, Danny Ames, Cliff Brophy and Stillwater County. The defendants cross-appeal from the judgment entered by the District Court on its order granting partial summary judgment to Dorwart. We affirm in part, reverse in part and remand for further proceedings.

¶2 We address the following dispositive issues on appeal and cross-appeal:

¶3 1. Did the District Court err in determining that the actions of the Sheriffs deputies in entering Dorwart's residence and levying upon personal property therein did not violate Dorwart's constitutional rights to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution or his right to privacy under Article II, Section 10 of the Montana Constitution?

¶4 2. Did the District Court err in determining that Montana's post-judgment execution statutes are unconstitutional because they do not provide the procedural due process of law required

by Article II, Section 17 of the Montana Constitution and the Fourteenth Amendment to the United States Constitution?

¶5 3. Are the Sheriffs deputies entitled to qualified immunity from individual liability for Dorwart's 42 U.S.C. § 1983 claims?

¶6 4. Did the District Court err in granting summary judgment in favor of Stillwater County and Cliff Brophy, in his capacity as Sheriff, on Dorwart's 42 U.S.C. § 1983 search and seizure claim?

¶7 5. Did the District Court err in granting summary judgment in favor of the defendants on Dorwart's conversion and trespass claims and Harry Dorwart's trespass claim?

¶8 6. Did the District Court err in concluding that Dorwart is not entitled to attorney's fees?

BACKGROUND

¶9 Dorwart was the named defendant in two actions in the Small Claims Division of the Justice Court in Stillwater County, Montana. Default judgments were entered against him in those actions on February 19 and March 11, 1991. The Justice Court subsequently issued writs of execution to enforce the judgments on March 12 and April 9, 1991, respectively.

¶10 On the evening of April 11, 1991, Dorwart was driving his pickup truck along Highway 78 between Columbus and Absarokee when he was stopped by Deputy Sheriff Danny Ames (Ames) and served with the two writs of execution. Ames also arrested Dorwart for driving under the influence of alcohol, seized the pickup truck and transported Dorwart to the Stillwater County Jail (Jail). After Dorwart was incarcerated in the Jail, either Ames or Deputy Sheriff Paul Caraway (Caraway) asked Dorwart whether the door to his residence was locked and Dorwart responded that one door was not locked. He also told the deputies that his wallet and driver's license were on the dashboard of his mother's car, which was parked in his driveway.

¶11 Ames and Caraway proceeded to Dorwart's residence, entered the house and the garage, and seized various items of personal property pursuant to the writs of execution. They also took Dorwart's wallet from the dashboard of the car. Neither Ames nor Caraway had requested permission from Dorwart to enter his residence.

¶12 Dorwart's pickup truck, its contents and his wallet were returned to him several days later. On April 18, 1991, Dorwart filed in Justice Court a Motion for Release of Property and to Quash the Writs of Execution, supported by an Affidavit of Exemption and other affidavits, asserting that the personal property which Ames and Caraway had seized from his house and garage either was exempt from execution or did not belong to him. The record does not indicate whether the Justice Court held a hearing on Dorwart's motion but, on September 30, 1991, it ordered that all of the property seized from Dorwart's house and garage be returned to its rightful owners. Dorwart subsequently retrieved the property from the Jail.

¶13 On April 5, 1993, Dorwart filed a complaint against Caraway, Ames, Sheriff Cliff Brophy (Brophy) and Stillwater County (collectively, the County). The complaint asserted various state and federal claims, as well as several common law tort claims, resulting from the seizure of his property and requested monetary damages. Dorwart later amended the complaint to add a claim for declaratory and injunctive relief based on his contention that Montana's post-judgment execution statutes are unconstitutional. Harry Dorwart, Dorwart's father and the owner of Dorwart's residence, asserted a trespass claim against Caraway and Ames.

¶14 The County moved for summary judgment on all claims against all defendants and Dorwart moved for partial summary judgment on all but two of his claims. The District Court granted Dorwart's motion for summary judgment on his claim for declaratory and injunctive relief, granted the County's motion

for summary judgment on the remainder of Dorwart's claims and entered judgment accordingly. Dorwart appeals and the County cross-appeals.

STANDARD OF REVIEW

¶15 Our standard in reviewing a district court's summary judgment ruling is *de novo;* we use the same Rule *56,* M.R.Civ.P., criteria as the district court. Clark v. Eagle Systems, Inc. (1996), 279 Mont. 279, 283, 927 P.2d 995, 997 (citations omitted). A party seeking summary judgment must establish the absence of any genuine issue of material fact which would allow the nonmoving party to recover and entitlement to judgment as a matter of law. Rule 56(c), M.R.Civ.P.; *Clark*, 279 Mont. at 283, 927 P.2d at 997-98 (citations omitted).

¶16 Ordinarily, we begin our review in a summary judgment case by determining whether the moving party established the absence of disputed and material fact issues. *See* Montana Metal Buildings, Inc. v. Shapiro (1997), 283 Mont. 471, 475, 942 P.2d 694, 696-97. Here, however, the material facts are undisputed and the parties' assertions of error relate only to the District Court's conclusions of law regarding entitlement to summary judgment. We review a district court's conclusions of law to determine whether those conclusions are correct. Albright v. State, by and through State (1997), 281 Mont. 196, 205, 933 P.2d 815, 821 (citation omitted).

DISCUSSION

¶17 I. Did the District Court err in determining that the actions of the Sheriffs deputies in entering Dorwart's residence and levying upon personal property therein did not violate Dorwart's constitutional rights to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and Article II, Section 11 of the Montana Constitution or his right to privacy under Article II, Section 10 of the Montana Constitution?

¶18 The District Court concluded that Ames and Caraway did not violate Dorwart's constitutional rights when they entered his home and levied upon property therein because the writs of execution constituted judicial authorization for their actions. Dorwart contends that this conclusion is erroneous, arguing that the writs, in and of themselves, were insufficient to justify intrusion into his home without a search warrant. As a result, according to Dorwart, the deputies' entry into his home and subsequent levy on his property violated his constitutional rights to be free from unreasonable searches and seizures and his right to privacy. We address Dorwart's separate search and seizure and privacy arguments in turn.

¶19 Dorwart's complaint stated two search and seizure-related claims against Caraway and Ames. The first was brought pursuant to 42 U.S.C. § 1983 (§ 1983), which authorizes a cause of action when a person has been deprived of a federally protected right by another person acting under color of state law. *See* 42 U.S.C. § 1983; Mysse v. Martens (1996), 279 Mont. 253, 260, 926 P.2d *765,* 769. This search and seizure-related claim alleged that Caraway and Ames violated Dorwart's rights under the Fourth Amendment to the United States Constitution. The second claim alleged that the deputies' entry into Dorwart's home and seizure of his personal property violated his state constitutional rights as guaranteed by Article II, Section 11 of the Montana Constitution. The County moved for summary judgment on both causes of action, contending that the deputies' actions neither deprived Dorwart of a federally protected right that would give rise to a § 1983 claim nor violated Article II, Section 11 of the Montana Constitution.

¶20 The District Court granted the County's motion, concluding that Caraway and Ames did not violate Dorwart's federal or state constitutional rights when they entered his home and levied upon personal property therein because the writs of execution constituted judicial authorization for their actions. Dorwart

argues that the writs, in and of themselves, were insufficient to justify intrusion into his home and, as a result, that the entry into his home and levy on his property violated his constitutional rights to be free from unreasonable searches and seizures.

¶21 The Fourth Amendment to the United States Constitution provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article II, Section 11 of the Montana Constitution mirrors the Fourth Amendment to the United States Constitution and, as a result, we analyze most search and seizure questions arising under Article II, Section 11 using traditional Fourth Amendment principles. State v. Siegal (1997), 281 Mont. 250, 264, 934 P.2d 176, 184. The fundamental purpose of the Fourth Amendment's prohibition against unreasonable searches and seizures is to protect the privacy and security of individuals and safeguard the sanctity of the home against arbitrary invasions by government officials. Camara v. Municipal Court (1967), 387 U.S. 523, *528,* 87 S.Ct. 1727, 1730, 18 L.Ed.2d 930, 935; State v. Gray (1968), 152 Mont. *145,* 149, 447 P.2d 475, 477. In effectuating that underlying purpose, the key principle followed by courts is that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara*, 387 U.S. at 528-29 (citations omitted).

¶22 The specific issue before us is whether an officer's entry into a private residence for the purpose of executing a writ of execution violates constitutional rights against unreasonable searches and seizures where the only authorization for the

officer's entry into the residence is the writ of execution itself. The County contends that this issue has been addressed in, and is controlled by, Ramsey v. Burns (1902), 27 Mont. 154, 69 P. 711. It relies on *Ramsey* for the proposition that one of the implied powers authorized by a writ of execution includes the levying officer's right to enter a judgment debtor's residence or place of business in order to execute the writ and, on that basis, contends that the deputies' search of Dorwart's home and seizure of property were not unreasonable because the writs of execution themselves authorized entry into his home. The County's reliance on *Ramsey* is misplaced.

¶23 In *Ramsey*, a special officer, appointed by a justice of the peace and acting pursuant to a pre-judgment writ of attachment, levied upon personal property belonging to a business owned by Ramsey. In executing the writ, the officer entered the business premises, locked the doors and remained in possession of both the premises and the personal property within for five days, releasing the property only when learning it had been mortgaged to another. *Ramsey*, 27 Mont. at 155, 69 P. at 712. Ramsey prevailed in a suit against the officer, the justice of the peace who issued the writ and the sureties of the justice of the peace for damages resulting from destruction of property, false imprisonment and interruption of her business and the defendants appealed. *Ramsey*, 27 Mont. at *155-56,* 69 P. at 712. In addressing the defendants' contention that the trial court erred in instructing the jury that an officer was not authorized to take possession of premises where property to be seized is located, this Court stated:

> An officer has the right to enter a business place against the will of the occupant, permission having been asked and refused, and to seize the property therein belonging to the occupant and subject to levy. It is impossible to make such levy in many cases, as where a whole stock of goods is seized, without taking possession of the place where the goods are.... The officer has a right to enter and have

> possession of the place, as above stated, for a reasonable time, and he may have there the goods in storage for such reasonable time as he may require to pack them and to procure the necessary transportation for their removal.

Ramsey, 27 Mont. at 156-57, 69 P. at 712. On that basis, we concluded the jury instruction erroneously stated the law. *Ramsey*, 27 Mont. at 157, 69 P. at 712.

¶24 *Ramsey* is readily distinguishable. Factual distinctions aside, no constitutional search and seizure issue relating to execution of a writ was raised or addressed in *Ramsey*. Thus, *Ramsey* has no application here.

¶25 Whether an officer's entry into a private residence to execute on a writ violates search and seizure rights, where the only authorization for the entry is the writ of execution itself, is an issue of first impression in Montana. The threshold question in analyzing search and seizure issues is whether the person asserting an invasion of these constitutional rights has a legitimate expectation of privacy in the area invaded. State v. McCarthy (1993), *258* Mont. 51, 55, 852 P.2d 111, 113. We have long recognized that a person has a legitimate expectation of privacy in his or her own home. *See, e.g.*, State v. Carlson (1982), 198 Mont. 113, 126, 644 P.2d 498, 505. Thus, Dorwart had a legitimate expectation of privacy in his home and, indeed, the County does not appear to argue otherwise.

¶26 Once a legitimate expectation of privacy has been established, any governmental intrusion into Dorwart's home conducted without a search warrant is *per se* unreasonable under the Montana and United States Constitutions subject to only a few well-established exceptions. *See* State v. Loh (1996), 275 Mont. 460,468, 914 P.2d 592, 597 (citing Katz v. United States (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576, 585). These well-established exceptions to the search warrant requirement include voluntary and knowing consent to a search (State

v. Rushton (1994), 264 Mont. 248, 257-58, 870 P.2d 1355, 1361) and exigent circumstances (State v. Dawson (1988), 233 Mont. 345, 353, 761 P.2d 352, 357).

¶27 Here, it is undisputed that Ames and Caraway did not have a search warrant authorizing their entry into Dorwart's home. It is also undisputed that Dorwart did not consent to the deputies' entry into his home. Furthermore, the circumstances of this case do not fit within the framework of the exigent circumstances exception or any other established exceptions to the search warrant requirement and the County does not argue that any of these exceptions exist in this case. Thus, these established exceptions to the search warrant requirement are not satisfied here and, as a result, it appears that the deputies' search of Dorwart's home and seizure of his property were constitutionally unreasonable. *See Loh* 275 Mont. at 468, 914 P.2d at 597.

¶28 The County contends, however, that it is well-established that a writ of execution, in and of itself, authorizes officers to enter private residences to levy on personal property therein. It cites to several cases in support of this proposition, but the cases are distinguishable.

¶29 The County first relies on People v. Sylva (Cal. 1904), 76 P. 814, in which the California Supreme Court stated that "[a]n officer charged with the duty of enforcing a judgment by execution has the right to enter the premises of the execution defendant if he can do so peaceably." *Sylva*, 76 P. at 815. In *Sylva*, an attorney and a deputy sheriff entered the defendant's home to levy on property pursuant to a writ of execution; the defendant pointed a gun at the two and ordered them to leave the premises. The defendant was convicted of assault with a deadly weapon and argued on appeal that the attorney and deputy were trespassers, thus giving him the right to use all force necessary to expel them from his property. The California court concluded that the writ of execution authorized the deputy to both peaceably enter the defendant's home and bring the attorney as an assistant and,

therefore, the two were not trespassers. Thus, the defendant's justifiable use of force defense failed as a matter of law. *Sylva*, 76 P. at 815. As in *Ramsey*, however, no constitutional search and seizure issue relating to writs of execution was raised or discussed in *Sylva*, and, as a result, that case has no application here.

¶30 The County also relies on Gumz v. Morrissette (7th Cir. 1985), 772 F.2d 1395, for the proposition that the issuance of a writ of execution by a court after entry of a judgment authorizes the seizure of a civil defendant's property. In *Gumz*, Wisconsin officials arrested the plaintiff and seized his dragline equipment based on their determination that the plaintiff had been dredging a waterway without a permit in violation of state civil statutes. The plaintiff brought an action against the officials in the federal district court asserting, in part, a § 1983 claim based on allegations that they violated his rights under the Fourteenth Amendment by seizing his property without affording him due process of law. *Gumz*, 772 F.2d at 1398. A jury rendered a verdict in favor of the defendants on this due process claim and the district court subsequently denied the plaintiffs motion to amend the verdict. *Gumz*, 772 F.2d at 1399. The plaintiff appealed, arguing that the trial court erred in determining that, if defendants established probable cause for their belief that the dragline was being used for illegal dredging, the seizure of the dragline would not violate due process constraints. *Gumz*, 772 F.2d at 1402.

¶31 The Seventh Circuit Court of Appeals concluded that the civil statutes at issue did not authorize the seizure of property without a prior forfeiture action, stating that "[s]eizure of a civil defendant's property would only be permissible after entry of judgment and issuance of a writ of execution by the court." *Gumz*, 772 F.2d at 1403. This statement, however, clearly was directed only to Fourteenth Amendment due process requirements necessary before state officials could deprive someone of property pursuant to the civil statutes at issue. Indeed, the

Seventh Circuit expressly did not address any Fourth Amendment search and seizure issues in *Gumz* because the plaintiff had waived those issues in the court below. *Gumz*; 772 F.2d at 1399, n.3. Furthermore, the quoted statement relates only to authorization of a seizure of property; the court made no reference to whether the issuance of a writ of execution would authorize the entry onto private property to conduct a search for property. For these reasons, *Gumz* is inapplicable here.

¶32 The County next cites to City of Costa Mesa v. Soffer (Cal. App. 1992), 13 Cal.Rptr.2d 735. In *Soffer*, the California Court of Appeals determined that entry into private property by city officials for inspection of an alleged nuisance, pursuant to judicial authorization, did not contravene the Fourth Amendment proscription against unreasonable searches and seizures. *Soffer*, 13 Cal.Rptr.2d at 741. The County asserts that the writs of execution in the present case constitute the same type of "judicial authorization" discussed by the California court in *Soffer* and, therefore, *Soffer* supports its argument that the writs of execution authorized the deputies' entry into Dorwart's home. We disagree.

¶33 In *Soffer*, the "judicial authorization" was a court order specifically directing the city officials to go onto the defendant's property to inspect the alleged nuisance. *Soffer*, 13 Cal.Rptr.2d at 736. Here, neither the writs of execution themselves, nor the post-judgment execution statutes pursuant to which the writs were issued, expressly directed or authorized the deputies to enter Dorwart's private residence to effectuate the seizure of his property. Thus, *Soffer* is distinguishable on its facts from the present case and is of no assistance to the County.

¶34 Finally, the County cites to Boyd v. United States (1886), 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, specifically relying on the United States Supreme Court's statement therein that

> [t]he entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth . . . Amendment. . . .

Boyd, 116 U.S. at 624. The County urges that, since *Boyd* has never been overruled, it constitutes controlling authority that writs of execution authorize officers to enter private residences to levy upon property therein without the necessity of a search warrant and without violating Fourth Amendment search and seizure principles. Again, we disagree.

¶35 First, the Supreme Court itself considers the above-quoted language from *Boyd* to be dicta, and has refused to conclude that the *Boyd* language required a holding that the Fourth Amendment warrant requirements did not apply to searches of private premises for the purpose of collecting assessed tax deficiencies. *See* G.M. Leasing Corp. v. United States (1977), 429 U.S. 338, 355-56, 97 S.Ct. 619, 630, 50 L.Ed.2d 530, 545-46. In this regard, we previously have determined that we need not regard dicta in Supreme Court cases as controlling the outcome of issues before us. *See* Commonwealth Edison Co. v. State (1980), 189 Mont. 191, 200, 615 P.2d 847, 852.

¶36 Further, the Supreme Court's statement in *Boyd* was premised on its determination that the Fourth Amendment prohibition against unreasonable searches and seizures does not apply in civil contexts such as executing a writ of execution because the underlying purpose of the search is to locate and seize property to which the creditor is entitled in satisfaction of a debt and not to discover evidence to support criminal charges against the owner of the premises. *See Boyd*, 116 U.S at 624. However, the Supreme Court subsequently has reevaluated its earlier cases which concluded that an administrative search touches only the periphery of the interests protected by the Fourth Amendment because it does not seek evidence of criminal activity and, thus,

that such a search involves only the less intense "right to be secure from intrusion into personal privacy" rather than the greater "self-protection" interests under the Fourth and Fifth Amendments. *See Camara*, 387 U.S. at 530 (citing Frank v. State of Maryland (1959), 364 U.S. 360, 79 S.Ct. 804, 3 L.Ed.2d 877; *Boyd*, 116 U.S. 616). Rather, the Supreme Court determined in *Camara* that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior..." because all citizens, law-abiding or not, have a strong interest in limiting the circumstances in which the sanctity of the private home may be invaded by official authority. *Camara*, 387 U.S. at 530-31.

¶37 We turn, then, to the issue of first impression in Montana which this case presents: whether an officer's entry into a private residence to execute on a writ of execution violates constitutional rights against unreasonable searches and seizures where the only authorization for the entry is the writ of execution itself. The issue includes two subissues: whether an entry into a residence to execute a writ of execution is subject to constitutional search and seizure provisions and, if so, whether the writ of execution satisfies, or is an exception to, the warrant requirement contained in those provisions. We address these subissues in turn, beginning with a closer review of the guidance provided by *Camara* and *G.M. Leasing* with regard to the interface between civil administrative searches and modern constitutional search and seizure principles.

¶38 In *Camara*, the Supreme Court addressed whether an administrative search of a citizen's residence to inspect for housing code violations violated Fourth Amendment rights when conducted without a search warrant. *Camara*, 387 U.S. at 534. There, the city housing code at issue gave authorized city inspectors "the right to enter, at reasonable times, any building, structure, or premises in the City to perform any duty imposed

upon them. . . ." *Camara*, 387 U.S. at 526. When Camara refused to allow a city inspector into his home without a search warrant, the city filed a criminal complaint. *Camara*, 387 U.S. at 527. Camara contended that the housing code provision violated the Fourth and Fourteenth Amendments because it allowed city officials to enter a private home without a search warrant and without probable cause to believe that a violation of the housing code existed therein. *Camara*, 387 U.S. at 527.

¶39 The Supreme Court first concluded, as discussed above, that the Fourth Amendment prohibition against unreasonable searches and seizures applies in civil, as well as criminal, contexts because all citizens have a strong interest in securing their homes from intrusion by officials regardless of the reason for the intrusion. *Camara*, 387 U.S. at 530-31. The Supreme Court was concerned that, when an inspector requests entry for an inspection, the occupant of the home has no knowledge of whether enforcement of the code actually requires entry into that home, whether the inspector is acting under proper authority, or the lawful limits of the inspector's power to search. These are matters which, under other circumstances, normally are addressed by a neutral magistrate in reviewing search warrant applications. Thus,

> [t]he practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. . . . We simply cannot say that the protections provided by the warrant procedure are not needed in this context. . . .

Camara, 387 U.S. at 532-33. For these reasons, the Supreme Court determined that administrative searches such as the housing code inspection were significant intrusions on interests protected by the Fourth Amendment and were subject to the warrant requirement. *Camara*, 387 U.S. at 534.

¶40 Similarly, in *G.M. Leasing*, the Supreme Court concluded that, in levying upon property to satisfy tax deficiencies, the government was not exempt from the Fourth Amendment stricture that a search of private property is unreasonable unless authorized by a valid search warrant. *G.M. Leasing*, 429 U.S. at 358. In that regard, the Supreme Court determined that the government's tax assessment, while authorizing all types of property seizures in general, did not authorize all types of warrantless intrusions into privacy to effect those seizures. *G.M. Leasing*, 429 U.S. at 358. Thus, the internal revenue agents' entry into G.M. Leasing's business premises, without a warrant, to levy on property therein violated G.M. Leasing's rights under the Fourth Amendment. *G.M. Leasing*, 429 U.S. at 359.

¶41 In both *Camara* and *G.M. Leasing*, the Supreme Court's primary concern was that, absent a judicially authorized search warrant issued after a showing of probable cause to search, there is no limitation on the discretion of the officer conducting such an administrative search of a private home or business. Placing such limitations on the discretion of when, where and how to conduct a search which intrudes upon a private area is the precise reason behind the Fourth Amendment's search warrant requirement. *Camara*, 387 U.S. at 534.

¶42 This Court also has long recognized that the protection against unreasonable searches and seizures provision in Montana's Constitution applies to all people and their homes and effects, without regard to whether criminal conduct is involved. *See* State ex rel. King v. District Court (1924), 70 Mont. 191, 196-97, 224 P. 862, 864 (discussing Article III, Section 7 of the 1889 Montana Constitution, which is identical to Article II, Section 11 of the 1972 Montana Constitution). On these bases, we conclude that an officer's entry into a private home to execute a writ of execution is subject to the search and seizure provisions of the Montana and United States Constitutions. The question remains, however, whether a writ of execution is an exception to,

or satisfies, the warrant requirement of these constitutional provisions.

¶43 In the analogous administrative inspection context addressed in *Camara*, the Supreme Court rejected the notion that an administrative search constituted an exception to the Fourth Amendment's warrant requirement. It determined that, to adequately protect a person's Fourth Amendment rights, there must be a showing of "probable cause" to conduct an administrative inspection. *Camara*, 387 U.S. at 534. In the administrative inspection arena, the probable cause requirement entails a determination, after weighing the need for the inspection in terms of the reasonable goal to be achieved thereby against the resulting intrusion, that the particular inspection is reasonable under the circumstances. *Camara* 387 U.S. at 534-35.

> The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant.

Camara, 387 U.S. at 539.

¶44 More directly on point is Nebraska v. Hinchey (Neb. 1985), 374 N.W.2d 14. There, a sheriffs deputy went to Hinchey's home to serve and execute a writ of execution. Although Hinchey refused several times to allow the deputy inside, he finally agreed, but asked the deputy to wait outside a moment while he "put something away." The deputy, however, immediately followed Hinchey inside the apartment and observed ajar of what appeared to be marijuana. Hinchey subsequently was arrested for possession of marijuana and drug paraphernalia. *Hinchey*, 374 N.W.2d at 16. Hinchey moved to suppress the evidence, arguing that the deputy had violated his Fourth Amendment rights. The trial court denied the motion, Hinchey was convicted

and, thereafter, he appealed the denial of his motion to suppress. *Hinchey*, 374 N.W.2d at 16-17.

¶45 On appeal, Hinchey argued that his Fourth Amendment rights were violated by the deputy's entry into his apartment without a search warrant. The prosecution responded that, once the deputy was inside the premises and saw the marijuana, he was authorized to seize it under the "plain view doctrine." Thus, the question before the Nebraska Supreme Court was whether the deputy was legally authorized to enter Hinchey's apartment without a warrant prior to viewing the jar of marijuana. The prosecution argued that, because the execution statutes required the deputy to seek property which could be levied upon, the writ of execution issued pursuant to those statutes provided the deputy with lawful authority to enter the apartment without a warrant. *Hinchey*, 374 N.W.2d at 18.

¶46 The Nebraska court observed at the outset that the statute requiring an officer to seek property on which a levy could be made could not supersede constitutional prohibitions against unreasonable searches and seizures. It determined that, while the Nebraska execution statute authorized the general "seizure" of Hinchey's property, it did not authorize a warrantless "search" for that property when such a search violated the debtor's Fourth Amendment rights. *Hinchey*, 374 N.W.2d at 18-19. The court further concluded that the writ of execution itself did not constitute judicial authorization, as contemplated by the Fourth Amendment's warrant requirement, because issuance of the writ was purely ministerial and did not require any action or review by a court; to obtain a writ, a judgment creditor needed only to file a praecipe with the clerk of court. *Hinchey*, 374 N.W.2d at 19. Indeed, the writ was issued

> without any showing upon which it may be found that property cannot otherwise be obtained without violating the debtor's fourth amendment right against unreasonable searches and seizures. That is why arming a sheriff or one

> of his deputies with a writ of execution is not the same as employing judicial process of a type required for one to obtain a search warrant or an arrest warrant. We see little reason to distinguish between the requirements which must be met before property or persons may be seized for criminal purposes and before property or persons may be seized for civil purposes. Likewise, the fourth amendment does not recognize such a distinction.

Hinchey, 374 N.W.2d at 19. As a result of these conclusions, the *Hinchey* court held that, absent exigent circumstances, an officer may not enter a private home to levy upon property therein without first obtaining an "execution warrant." *Hinchey*, 374 N.W.2d at 20. Thus, the officer's entry into Hinchey's home pursuant to the writ of execution did not constitute an exception to the Fourth Amendment warrant requirement and the writ itself did not rise to the level of a search warrant authorizing the search.

¶47 In the present case, it is undisputed that Caraway and Ames did not obtain a search warrant authorizing them to enter Dorwart's home. In arguing that a warrant was not required under the circumstances, the County points out that the writs of execution in this case were issued and acted upon in conformity with Montana's post-judgment execution statutes. This is, of course, similar to the argument made in *Hinchey* and rejected on the basis that a statute cannot supersede the Fourth Amendment prohibition against unreasonable searches and seizures. *See Hinchey*, 374 N.W.2d at 18. The mere fact that the issuance of the writs, and the deputies' conduct pursuant to those writs, did not violate applicable statutes does not establish that the statutory procedures adequately protect the constitutional rights of either Dorwart or other judgment debtors under similar circumstances. *See, e.g.*, Duran v. Buttrey Food, Inc. (1980), 189 Mont. 381, 392, 616 P.2d 327, 333. "To accept that rationale would be to surrender this Court's power to determine the constitutionality of enactments of the legislature." *Duran*, 189 Mont. at 392, 616 P.2d at 333.

¶48 Moreover, nothing in the post-judgment execution statutes expressly authorizes the entry into a private home for the purposes of executing a writ of execution. While the execution statutes authorize the levy on — or "seizure" of — a judgment debtor's personal property pursuant to a writ of execution, they do not authorize officials to enter private homes to search for that property. *See, e.g.*, §§ 25-13-304, 25-13-306, 25-13-307, 25-13-402, MCA.

¶49 The County also contends that the writs were judicially approved by the Stillwater County Justice of the Peace, thus fulfilling the "neutral magistrate" purpose served by the constitutional search warrant requirement. We disagree. The writs of execution here cannot be said to have been "judicially approved" in a manner which fulfilled the purpose served by — or the requirements for — a search warrant.

¶50 Review of a search warrant application by an impartial magistrate ensures that a neutral and detached evaluation of the situation is interposed between the investigating officers and the private citizen. State v. Wilson (1994), 266 Mont. 146, 149, 879 P.2d 683, 684. As a result, Montana law requires that a judge or magistrate evaluate a search warrant application and make an objective determination as to whether an intrusion into a private home is reasonable and justified under the circumstances. *Wilson*, 266 Mont. at 149, 879 P.2d at 684. A judge may issue a search warrant only upon written application, made under oath or affirmation, which states sufficient probable cause for authorizing the search. Art. II, Sec. 11, Mont. Const.; U.S. Const. amend. IV; § 46-5-221, MCA. Moreover, a search warrant must particularly describe the person or place to be searched and the items to be seized. Art. II, Sec. 11, Mont. Const.; U.S. Const. amend. IV; § 46-5-221, MCA.

¶51 Here, it is true that the writs of execution were signed by the Stillwater County Justice of the Peace. Indeed, Rule 23(C), M.J.C.C.R.Civ.P., requires that a writ of execution to enforce a

justice court judgment be signed by a justice of the peace. However, neither the justice court civil procedure rules nor the post-judgment execution statutes require any substantive impartial review by a court regarding whether a writ of execution should be issued. Nor does the record reflect any applications for the writs at issue here based on affidavit or other testimony describing the place to be searched, the property sought and the necessity of the search. Likewise, the record is devoid of any indication that the Justice of the Peace made an objective determination that there was probable or reasonable cause to believe the search of Dorwart's home was justified under the circumstances. Finally, the writs themselves do not constitute a suitably restricted search warrant because they fail to delineate the property sought or the place to be searched with any specificity.

¶52 The procedures used here, and the writs of execution issued thereunder, simply did not sufficiently limit the deputies' discretion in executing the writs to satisfy the search and seizure provisions of the Fourth Amendment to the United States Constitution or Article II, Section 11 of the Montana Constitution. We conclude, therefore, that the writs of execution were not adequate — in and of themselves — to authorize the deputies' entry into Dorwart's home and that Ames' and Caraway's entry into Dorwart's home and seizure of his personal property, without his consent and without benefit of a warrant, violated Dorwart's rights under these constitutional provisions. As a result, we hold that the District Court erred in determining that the actions of Caraway and Ames in entering Dorwart's residence and levying upon personal property therein did not violate Dorwart's right to be free from unreasonable searches and seizures.

¶53 Having concluded that writs of execution do not authorize the entry into and search of a private home, the question arises as to how lawful authority to enter and search a home to execute a

writ of execution can be obtained. Again, we look to *Hinchey* for guidance.

¶54 The *Hinchey* court observed, first, that an officer still has a duty to seek and take possession of property which can be obtained without violating the owner's Fourth Amendment rights. *Hinchey*, 374 N.W.2d at 20. When the officer has been unable to secure such property as would satisfy the underlying judgment, however, and there is reason to believe that personal property subject to execution may be located within the debtor's residence, an "execution warrant" should be obtained pursuant to the following procedures:

> Such an execution warrant should be issued only by a judge . . . upon reasonable cause supported by affidavit setting out that a writ of execution has been issued and returned unsatisfied in whole or in part and that the affiant has reason to believe that there is property subject to execution in the possession of the debtor kept and maintained within the debtor's residence, not otherwise available for execution, describing the property sought and the place and purpose of the execution. If the judge is satisfied that there is reasonable cause to believe that there is property of the debtor within the debtor's possession and that other property is not available for levy and execution, the judge may then issue an execution warrant authorizing the officer to enter the premises and levy upon property subject to execution. In this manner the fourth amendment prohibition against unreasonable searches and seizures will be satisfied.

Hinchey, 374 N.W.2d at 20. We agree with, and adopt, the execution warrant requirement and procedures set forth in *Hinchey* for those situations where insufficient property has been obtained pursuant to the writ of execution. We conclude that such an execution warrant, obtained under the procedures set forth above, will protect judgment debtors' rights to be free from

unreasonable searches and seizures under both the Montana and United States Constitutions.

¶55 The District Court also granted summary judgment to the County on Dorwart's claim that the actions of Caraway and Ames violated his right to privacy as guaranteed by the Montana Constitution. In this regard, the court concluded that the deputies' actions were reasonable, within the scope of the law and justified by the writs of execution. Thus, the court further concluded that, because no unreasonable search took place, Dorwart's privacy claim failed as a matter of law. Dorwart argues that the District Court's conclusions are erroneous and that there is no compelling state interest which justified the nonconsensual, warrantless entry into his home.

¶56 Article II, Section 10 of the Montana Constitution provides as follows:

> The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

We previously have held that an official action which constitutes a "search" as that term is defined, and which is conducted without benefit of a search warrant, implicates Article II, Section 10 of Montana's Constitution and must be justified by the demonstration of a compelling state interest. *See Siegal*, 281 Mont. at 257, 934 P.2d at 192. Moreover, any compelling state interest justifying such an intrusion on a person's privacy must be closely tailored to effectuate only that compelling interest. State v. Pastos (1994), 269 Mont. 43,47, 887 P.2d 199, 202 (citing Zablocki v. Redhail (1978), 434 U.S. 374, 388, 98 S.Ct. 673, 682, 54 L.Ed.2d 618, 631). Thus, as it is clear that there was a warrantless search of Dorwart's home, there also must be a concomitant compelling state interest justifying that search in order to avoid violating Dorwart's right to privacy under the Montana Constitution.

¶57 We held above that the deputies' actions of entering Dorwart's home and seizing his personal property therein constituted an unreasonable search and seizure. As a result, the District Court's conclusion that no violation of Dorwart's constitutional privacy rights occurred, to the extent it is based on the erroneous determination that the search was reasonable, also is erroneous. Thus, we address the arguments presented regarding whether a compelling state interest justified the intrusion into Dorwart's home.

¶58 The County does not specifically assert the existence of a compelling state interest justifying the intrusion into Dorwart's home by Caraway and Ames, but rather focuses on the fact that the writs of execution were issued by the Stillwater County Justice Court in conformity with the statutes governing post-judgment execution procedures. On that basis, it argues that no violation of privacy rights occurred because the writs gave the deputies legal authority to enter Dorwart's home. We have resolved this argument against the County above and need not address it further here.

¶59 The Attorney General of the State of Montana (State), appearing as amicus curiae, argues that the compelling state interest here is the enforcement of monetary judgments by the seizure of a judgment debtor's property and the preservation of the credibility of the judicial system. We previously have recognized that a compelling state interest justifying an intrusion into a person's privacy may exist where the state is acting to enforce its criminal laws for the benefit and protection of other fundamental rights of its citizens. *See, e.g., Siegal*, 281 Mont. at 263, 934 P.2d at 184; State v. Solis (1984), 214 Mont. 310, 319, 693 P.2d 518, 522. In the present case, however, the entry into Dorwart's home was not undertaken to enforce the state's criminal laws nor was it for the purpose of protecting society in general from the actions of criminal wrongdoers. The entry was effectuated for the purpose of enforcing a civil judgment be-

tween two private citizens. While we agree that the state has an interest in preserving the integrity of our judicial system and the enforceability of judgments, this interest is not so "compelling" as to justify an intrusion into a person's private home, without his or her consent, for the purposes of searching through that home and seizing any and all items of property which might have some value.

¶60 Neither the County nor the State presents additional argument as to the existence of a compelling state interest, closely tailored to effectuate only that interest, which justified the warrantless entry into Dorwart's home and we conclude that no such compelling interest exists. As a result, we hold that the District Court erred in concluding that the actions of Caraway and Ames in entering Dorwart's residence and levying upon personal property therein did not violate Dorwart's right to privacy under Article II, Section 10 of the Montana Constitution.

¶61 Because the District Court erroneously concluded that Dorwart's right to be free from unreasonable searches and seizures and right to privacy were not violated by the deputies' actions in this case and granted summary judgment to the County on that basis, further consideration by the trial court of Dorwart's search and seizure and right to privacy claims under the state constitution was prematurely terminated. In light of our holdings that the District Court erred in granting summary judgment on Dorwart's claims under Article II, Sections 10 and 11 of the Montana Constitution, we remand for further proceedings on those state constitutional claims.

¶62 2. Did the District Court err in determining that Montana's post-judgment execution statutes are unconstitutional because they do not provide the procedural due process of law required by Article II, Section 17 of the Montana Constitution and the Fourteenth Amendment to the United States Constitution?

¶63 Montana's post-judgment execution statutes are located in Title 25, Chapter 13 of the Montana Code Annotated (MCA). Pursuant to those statutes, a party who receives a judgment for money or the possession of property may have a writ of execution issued to enforce that judgment. *See* §§ 25-13-101(1) and 25-13-201, MCA. A writ of execution issued against the property of the judgment debtor must be satisfied through the levy on and sale of the judgment debtor's personal or, if necessary, real property. *See* §§ 25-13-304 and 25-13-402, MCA. All property of the judgment debtor not specifically exempt by law is subject to execution (§ 25-13-501, MCA) and property exempt from execution is set forth in Title 25, Chapter 13, Part 6 of the MCA.

¶64 In creating the statutory exemptions from execution, the Montana Legislature provided that some types of property are completely exempt from execution, while other types of property are exempt from execution only up to a certain monetary amount. For example, § 25-13-608, MCA, provides that judgment debtors are entitled to exemption from execution of the property and benefits enumerated thereunder without limitation as to the monetary value of the property or benefit. In contrast, § 25-13-609, MCA, provides that judgment debtors are entitled to exemption from execution of the debtor's interest, not exceeding designated monetary values, in various specified items of personal property. In this case, Dorwart claimed that the deputies levied on personal property which was exempt under § 25-13-609, MCA.

¶65 Dorwart's complaint sought a declaratory judgment and injunctive relief on the basis that Montana's post-judgment execution statutes violate his rights to due process of law under the Montana and United States Constitutions. He asserted that he has a property interest in the statutory exemptions from execution provided to judgment debtors and that the statutory execution procedures are constitutionally inadequate because they

allowed the County to deprive him of his property interest in the exemptions from execution without due process of law.

¶66 The District Court granted Dorwart's motion for summary judgment on this claim, determining that the due process provided by the execution statutes is constitutionally deficient. The County contends that the District Court erred, arguing that Dorwart has no constitutionally protected property interest in asserting a statutory personal property exemption and, absent such a property interest, there can be no due process violation. The County also argues that, even if Dorwart has a protected property interest, Montana's postjudgment execution statutes provide adequate due process. We address these arguments in turn.

A. Property interest in statutory exemptions

¶67 The Montana Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." Art. II, Sec. 17, Mont. Const. Similarly, the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law.

¶68 In determining whether constitutional due process protections have been violated in a given case, we first address whether a property or liberty interest exists which rises to a level accorded due process protection under the United States and Montana Constitutions. Akhtar v. Van De Wetering (1982), 197 Mont. 205, 210, 642 P.2d 149, 152. In order to establish a property interest in a benefit such as the personal property exemptions at issue here, a person must show that he or she has a legitimate claim of entitlement to the benefit. *Akhtar*, 197 Mont. at 211, 642 P.2d at 153 (citing Board of Regents v. Roth (1972), 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561). The source of such an entitlement to a benefit may be found in state law. *Akhtar*, 197 Mont. at 211, 642 P.2d at 153 (citing *Roth*, 408 U.S.

at 577). Therefore, in determining whether Dorwart has a legitimate claim of entitlement to statutory exemptions from execution which creates a constitutionally protected property right, we look first to the statutes establishing the property exemptions available to a judgment debtor in Montana.

¶69 Section 25-13-606, MCA, expressly provides that a resident of Montana is "entitled" to the statutory exemptions from execution. Sections 25-13-608 and 25-13-609, MCA, also provide that judgment debtors are "entitled" to the specific exemptions from execution enumerated therein. Moreover, "entitle" is defined as "to give a right or legal title to. . . [t]o qualify for; to furnish with proper grounds for seeking or claiming." BLACK'S LAW DICTIONARY 532 (6th ed. 1990). Thus, by stating that judgment debtors are "entitled" to the statutory exemptions, the Montana Legislature has given judgment debtors a legal right to claim and benefit from those exemptions.

¶70 The County posits, however, that we construed the statutory exemptions from execution as personal privileges, rather than entitlements, in Tetrault v. Ingraham (1918), 54 Mont. 524, 171 P. 1148, and Matter of Estate of Sandvig (1991), 250 Mont. 220, 819 P.2d 184. From that premise, it argues that a judgment debtor has no property right entitling him or her to claim personal property as exempt from execution. We disagree.

¶71 In *Tetrault*, the sheriff levied on and sold property the judgment debtor previously had sold to another person. *Tetrault*, 54 Mont. at 527, 171 P. at 1149. In subsequent litigation, the purchaser at the sheriffs sale asserted that the property had been exempt from execution at the time he purchased it. *Tetrault*, 54 Mont. at 525-26, 171 P. at 1149. In discussing on appeal whether the property was exempt from execution, we determined that the right to claim an exemption is a "personal privilege" of the judgment debtor which can be — and was — waived by the debtor when he sold the property prior to the sheriffs sale.

Tetrault, 54 Mont. at 528, 171 P. at 1149. The ability to claim property exemptions was a "personal privilege" because the exemption was personal to the debtor and did not attach to, or transfer with, the property when sold to another. In other words, *Tetrault's* "personal privilege" language related to who could claim the exemption; it did not relate to whether the exemption from execution was an entitlement or a privilege for purposes of determining whether a property right exists in the exemptions. Thus, *Tetrault* is not authority for the proposition that a judgment debtor does not have a property interest in statutory exemptions from execution.

¶72 Nor does *Estate of Sandvig* support the County's argument that Dorwart does not have a property interest in claiming statutory exemptions from execution. There, the appellants owned a 1929 Model A Ford which was levied on and sold in partial satisfaction of a judgment debt owed to the Sandvig estate. They did not claim the Ford as exempt property. *Estate of Sandvig*, 250 Mont. at 221-22, 819 P.2d at 185. Subsequently, the appellants petitioned for bankruptcy, claiming a different vehicle as exempt property under the bankruptcy statutes. Several weeks later, they petitioned the district court for recovery of $1,200 each from the Sandvig estate for their exemption interest as judgment debtors in the Ford. The district court denied their petition on the basis that the appellants had waived their exemption interest in the Ford by obtaining an exemption for a different vehicle in the bankruptcy proceeding. We affirmed and, in doing so, reiterated the statement from *Tetrault* that the statutory exemptions from execution are personal privileges. *Estate of Sandvig*, 250 Mont. at 222, 819 P.2d at 185-86. We did not further discuss or refer to the "personal privilege" language and, as in *Tetrault*, that language did not relate to whether the judgment debtors had a property interest in statutory exemptions. Indeed, as in *Tetrault*, no issue was raised or discussed in *Estate of Sandvig* regarding whether the appellants had a prop-

erty interest in the statutory exemptions from execution which would raise due process concerns.

¶73 The State also argues that Dorwart does not have a property interest in the exemptions which is protected under the due process provisions of the Montana and United States Constitutions. The State points out that, pursuant to § 25-13-609, MCA, Dorwart's interest in the listed statutory exemptions from execution lies only in the specified monetary amounts provided in the statute, rather than in any particular item of property, and, as a result, Dorwart cannot have a protected property interest in the specific items of personal property. The State asserts that the interest protected by the statutory exemption is merely the debtor's equity interest, up to the statutorily established amount, in the property's value. Under the State's theory, the debtor is not entitled to retain possession of exempt property which has a value greater than the statutorily exempt amount, but is entitled only to the exempted value of that property. Thus, according to the State, the debtor does not have a protected property interest in the specified item of personal property.

¶74 The State misapprehends the nature of the protected property interest at issue here. A judgment debtor's property interest lies in the statutory exemption from execution itself and the ability to claim that exemption. The resulting benefit to the debtor from claiming a statutory exemption from execution may be either retaining possession of the item of property itself or receiving money equivalent to the statutorily exempt amount, depending on the nature and value of the particular item of property. Regardless of the form in which the debtor ultimately receives the benefit of the exemption from execution, he or she is entitled to claim the statutory exemption and that is the property interest which is protected by the right to due process.

¶75 We conclude that, by providing that all Montana residents are entitled to specified exemptions from execution, the Legislature has conferred upon judgment debtors an entitlement to

claim and benefit from those exemptions. We hold, therefore, that Montana judgment debtors have a property interest in the statutory exemptions from execution which is protected by the due process guarantees contained in the Montana and United States Constitutions.

B. Adequacy of due process provided by the post-judgment execution statutes

¶76 Having held that due process protects a judgment debtor's property interest in statutory exemptions from execution, we turn to the District Court's determinations that Montana's post-judgment execution statutes do not provide adequate due process and are, therefore, unconstitutional. In this regard, we observe that due process generally requires notice of a proposed action which could result in depriving a person of a property interest and the opportunity to be heard regarding that action. *See* Matter of Klos (1997), 284 Mont. 197, 205, 943 P.2d 1277, 1281.

¶77 The County argues that the District Court's ultimate conclusion that the statutes are unconstitutional is erroneous because the court failed to follow the United States Supreme Court's binding precedent in Endicott-Johnson Corp. v. Encyclopedia Press (1924), 266 U.S. 285, 45 S.Ct. 61, 69 L.Ed. 288. We disagree.

¶78 In *Endicott-Johnson*, the Supreme Court held that due process of law under the Fourteenth Amendment to the United States Constitution does not require that a judgment debtor be given notice and an opportunity to be heard prior to the issuance and execution of a writ of garnishment. When the debtor has been given an opportunity to be heard and have his or her day in court regarding the underlying judgment, he or she must take notice of what will follow after entry of the judgment; no further notice or hearing is necessary before instituting supplemental proceedings to enforce the judgment. *Endicott-Johnson*, 266

U.S. at 288.

¶79 *Endicott-Johnson* addressed only whether notice and opportunity for a hearing must be afforded to a judgment debtor prior to the issuance and execution of a writ of garnishment. It did not address whether due process required notice and opportunity for a hearing after the writ has been issued and the debtor's monies garnished, so that the debtor might be allowed to assert any available exemptions from garnishment or execution. Indeed, the existence of statutory exemptions from garnishment or execution was not raised in *Endicott-Johnson* and the Supreme Court did not discuss whether statutory exemptions from execution or garnishment might affect due process considerations in such situations.

¶80 Nor are the additional cases on which the County relies as support for its assertion that *Endicott-Johnson* controls the due process issue before us applicable. While two of those cases cite to *Endicott-Johnson* for its holding that notice and opportunity for a hearing are not required prior to a writ of garnishment or execution being issued, neither case addressed whether due process requires notice and opportunity for a hearing after a debtor's money has been garnished or property levied on so that a debtor may effectively assert available exemptions. *See* Langford v. State of Tennessee (W.D. Tenn. 1973), 356 F.Supp. 1163, 1164; Moya v. DeBaca (D.N.M. 1968), 286 F.Supp. 606, 608. The remaining two cases on which the County relies, while recognizing the continued viability of the *Endicott-Johnson* holding within its factual parameters, explicitly distinguish *Endicott-Johnson* from, and hold it inapplicable to, situations where statutory exemptions from execution or garnishment exist of which the debtor may be erroneously deprived if not afforded notice and opportunity to be heard at some point during the post-judgment proceedings. *See* Neely v. Century Finance Co. of Ariz. (D. Ariz. 1985), 606 F.Supp. 1453, 1461-62; Cagle v. Carlson (Ariz. App. 1985), 705 P.2d 1343, 1348.

¶81 Moreover, we observe that many of the recent federal cases which have addressed the constitutionality of state statutory schemes for post-judgment garnishment or execution also have determined that *Endicott-Johnson* is factually distinguishable and, therefore, not dispositive in cases where the statutes at issue grant judgment debtors the right to claim various exemptions from execution. As the United States Court of Appeals for the Tenth Circuit has noted, *Endicott-Johnson* did not consider the existence of exempt property which might be erroneously seized and sold if some post-judgment notice and hearing are not accorded to the debtor. Aacen v. San Juan County Sheriffs Dept. (10th Cir. 1991), 944 F.2d 691, 695 (citations omitted).

> "*Endicott's* rationale assumed that the judgment resolved all outstanding issues between the debtor and the creditor, collection being a ministerial act. However, the judgment does not resolve whether certain property is exempt." *McCahey v. L.P. Investors* [(2nd Cir. 1985), 774 F.2d 543, 548]. That is, while the judgment resolves the issue whether a debt exists, it does not address whether the creditor can seek satisfaction of the debt from this particular asset.

Aacen, 944 F.2d at *695 see also* Finberg v. Sullivan (3rd Cir. 1980), 634 F.2d 50, 56-57; Deary v. Guardian Loan Co., Inc. (S.D.N.Y. 1982), 534 F.Supp. 1178, 1185; Kirby v. Sprouls (C.D. 111.1989), 722 F.Supp. 516, 520. Indeed, some cases have questioned *Endicott-Johnson's* continued viability in light of modern-day due process jurisprudence. *See, e.g., Finberg*, 634 F.2d at 56-57; Dionne v. Bouley (1st Cir. 1985), 757 F.2d 1344, 1351; *Deary*, 534 F.Supp. at 1185-86.

¶82 We are persuaded by the reasoning of the above cases. As a result, we conclude that, insofar as Dorwart asserts that Montana's post-judgment execution statutes violate due process of law because they do not adequately protect his property interest in the exemptions available thereunder, *Endicott-Johnson* is not controlling and the District Court did not err in so

determining. Having rejected the County's threshold assertion of error, we proceed to address the substantive basis for the District Court's conclusion that Montana's post-judgment execution statutes are unconstitutional because they do not provide judgment debtors with notice of the seizure of property, notice of the statutory exemptions from execution, notice of procedures by which to claim exemptions and of the availability of a hearing regarding those exemptions, and a prompt hearing on whether the property is exempt.

¶83 In addressing whether statutes governing post-judgment execution and garnishment procedures provide adequate due process protections, many of the federal cases cited above apply a balancing test culled from Mathews v. Eldridge (1976), 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18. *See, e.g., Aacen*, 944 F.2d at 695-96; *Dionne*, 757 F.2d at 1352; *Finberg*, 634 F.2d at 58; *Kirby*, 722 F.Supp. at 521.

> [[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Indeed, we previously have recognized and applied this balancing test in addressing the extent of procedural safeguards required to protect due process rights under other circumstances (see M.C. v. Department of Institutions (1984), 211 Mont. 105, 109-10, 683 P.2d 956, 958-59; Matter of M.F. (1982), 201 Mont. 277, 284-86, 653 P.2d 1205, 1208-09), and it is appropriate that we weigh the *Mathews*

factors in our consideration of the due process issue here, as did the District Court.

1. Private Interests Involved

¶84 Applying the first prong of the *Mathews* test, it is clear that the private interests of both the judgment creditor and the judgment debtor are affected by the official action of levying upon personal property under a writ of execution. The judgment creditor's interest in the process of executing on a judgment is to obtain the money or property to which the creditor is entitled. The creditor is owed a debt and has expended time and money in taking legal action to reduce that debt to a judgment. Having obtained a judgment against the debtor, the creditor has a strong interest in the speedy and inexpensive satisfaction of that judgment. Furthermore, if the creditor's ability to execute on the judgment is unduly delayed, there is a possibility that the debtor may dispose of the property or that the property may diminish in value, thus reducing the creditor's ability to satisfy the judgment.

¶85 The judgment debtor's interest in the execution process, on the other hand, is to preserve his or her ability to claim that certain property is not subject to execution. As we concluded above, judgment debtors have a property interest in the ability to claim statutory exemptions from execution and, thus, have a strong interest in their ability to initiate procedures by which to effectively claim those exemptions and preserve exempt property. This includes the debtor's interest in asserting the statutory exemptions from execution to which he or she is entitled and receiving a prompt determination of whether the property which has been, or is about to be, levied on is subject to execution.

¶86 While the creditor's interest in satisfying a judgment clearly overrides the debtor's interest in any nonexempt property, the debtor's interest outweighs that of the creditor as to any property which is statutorily exempt from execution. "Since the debtor has a significant interest in protecting exempt property from

seizure, clearly, the debtor is entitled to procedural safeguards that do not adversely affect the creditor's adjudicated rights." *Kirby*, 722 F.Supp. at 521. Once the property is levied on, however, thereby removing the possibility that the debtor will destroy or conceal these assets, the creditor's interests are adequately preserved and the debtor's interest in the property becomes "very compelling." *Aacen*, 944 F.2d at 696; *Dionne*, 757 F.2d at 1352.

2. Risk of Erroneous Deprivation and Value of Other Procedural Safeguards

¶87 The second *Mathews* factor necessitates an examination of the post-judgment execution statutes, in light of the asserted procedural deficiencies of those statutes, to determine whether, under the statutory procedures, there is a risk that judgment debtors will be erroneously deprived of their property and whether requiring additional procedural safeguards would be valuable in reducing the risk of erroneous deprivation.

a. notice of the seizure of property

¶88 Dorwart first asserts that the post-judgment execution statutes are procedurally inadequate because they fail to require that judgment debtors be notified of the seizure of their property either before or after the fact. Indeed, while Dorwart was provided with actual notice of the pending seizure of his property when he was served with the two writs of execution, there is no statutory requirement in the MCA that writs of execution be served upon a judgment debtor at any time. Nor do the statutes provide for any other method of notifying a judgment debtor that property has been seized in satisfaction of a judgment.

¶89 Without notice to a debtor that property will be, or has been, seized under a writ of execution, a debtor's exempt property could be levied on and sold before the debtor was aware of the seizure, particularly if the property were not in the debtor's direct

possession. Providing such notice to a debtor would protect the debtor's ability to assert the statutory exemptions from execution to which the debtor is entitled. It is clear, however, that a requirement that the debtor be notified of a seizure of property may detrimentally affect a creditor's interest by creating an opportunity for the debtor to secrete or dispose of property before the property can be levied on.

¶90 In recognition of these competing concerns, due process usually does not require that a debtor be given notice prior to issuance of a writ of execution or even prior to the levy on the property, as long as the debtor is given notice of the property seizure in a manner which protects the debtor's ability to assert exemptions. *Dionne*, 757 F.2d at 1352; *Finberg*, 634 F.2d at 59. However, "[o]nce the attachment is made, removing the possibility that the debtor will secrete his assets, the debtor must receive and be notified of a timely opportunity to challenge any sequestration of his property which the law makes unattachable." *Dionne*, 757 F.2d at 1352 (citations omitted). The additional procedural safeguard of providing a judgment debtor with notice at the time of or shortly after seizure would be valuable in decreasing the risk of an erroneous deprivation of the debtor's exempt property.

b. notice of the statutory exemptions

¶91 Dorwart also asserts that the post-judgment execution statutes do not provide adequate due process because they do not require that debtors be informed of the existence of exemptions from execution. In this regard, the only notice of exemptions provided in this case was a reference at the bottom of each of the writs of execution directing the sheriff to satisfy the judgment out of any of Dorwart's property which was "NOT EXEMPT FROM EXECUTION." The writs did not indicate what property is statutorily exempt from execution or explain where a person could find information on available exemptions, and the post-

judgment execution statutes do not require that judgment debtors be provided such information.

¶92 As we concluded above, judgment debtors have a protected property interest in the ability to claim and benefit from statutory exemptions from execution. That property interest could be lost if they are not informed that the exemptions exist because a debtor unaware of the exemptions likely will not claim them. Thus, there is a risk that debtors will be erroneously deprived of their interest in, and ability to claim, the statutory exemptions from execution.

¶93 In general, due process requires notice which, under the circumstances, is reasonably calculated to inform interested parties of the action and afford them an opportunity to present objections. *Aacen*, 944 F.2d at 697; *Finberg*, 634 F.2d at 61-62. Notice to a judgment debtor informing him or her of the availability of exemptions from execution and where information about those exemptions can be found would preserve the debtor's opportunity to present objections to the levy on, and possible sale of, property which is exempt from execution. To that extent, the additional procedural requirement that debtors be provided with notice of the existence of exemptions and how to locate more information about them would be valuable in reducing the risk of erroneously depriving judgment debtors of their interest in claiming statutory exemptions from execution.

> c. notice of procedures by which to claim exemptions and of the availability of a hearing regarding those exemptions

¶94 Dorwart next contends that the statutes at issue are procedurally inadequate because they do not provide for notice to a judgment debtor of procedures whereby the debtor may claim property, wages or benefits as exempt from execution and receive a hearing on that claim. Indeed, Montana's post-judgment execution statutes do not provide any means by which statutory exemptions can be claimed and determined by a court

of law. In response to this statutory vacuum, several methods of claiming exemptions have developed and been judicially approved (see, *e.g.*, Welch v. Huber (1993), 262 Mont. 114, 115, 862 P.2d 1180, 1181; State ex rel. Bartol v. Justice of the Peace Court (1936), 102 Mont. 1, 5, 55 P.2d 691, 691-92), but none have been incorporated into the execution statutes. It is clear that Dorwart availed himself of one of these methods by moving for the release of his property and to quash the writs of execution, which resulted in the Justice Court ordering the return of his seized property. However, Dorwart did not receive actual notice of any available procedures, statutory or otherwise, to claim exemptions from execution. The writs of execution issued in this case were completely silent as to whether a process existed by which to assert exemption rights and how to initiate such a process. Furthermore, the statutory post-judgment execution procedures contain no provision for affording a judgment debtor notice of the availability of any means of asserting exemptions from execution and receiving a hearing on those exemptions.

¶95 The failure to provide notice of any procedures, whether statutory or nonstatutory, by which a judgment debtor may claim the available exemptions from execution and receive a hearing on those claims creates a risk that the debtor may be erroneously deprived of exempt property. Without such notice, a judgment debtor could either fail to pursue a legitimate remedy or not discover the existence of a remedy until it is too late to reclaim the property. In light of the complete absence in Montana's post-judgment execution statutes of provisions for notifying judgment debtors of procedures to claim exemptions from execution, it is clear that additional procedural safeguards would be valuable.

d. prompt hearing on whether property is exempt

¶96 Finally, Dorwart asserts that the post-judgment execution statutes are unconstitutional because they fail to specifically provide for a hearing on claimed exemptions available under the

post-judgment execution procedures or for prompt disposition of exemption claims. Due process clearly requires that a person be given an opportunity for a hearing at which to present objections to an action which could result in depriving the person of a property interest. *See Matter of Klos*, 284 Mont. at 205, 943 P.2d at 1281; *Aacen*, 944 F.2d at 697. In the present case, Dorwart asserted his exemption claims by way of his motion for release of his property and to quash the writs of execution and, eventually, the property levied on was returned to him. However, the record does not indicate whether Dorwart ever received a hearing on his exemption claims.

¶97 It is likely that, in most cases, the judgment creditor will have levied on the property prior to the debtor asserting exemptions from execution and, as a result, the longer a hearing on, and disposition of, the debtor's exemption claims is delayed, the longer the debtor is deprived of possession of the exempt property. Thus, absent a prompt hearing on a judgment debtor's claim that property is exempt from execution, there is a risk of deprivation of the debtor's property. Requiring a prompt hearing and decision on whether a judgment debtor's property is exempt from execution would be valuable in diminishing this risk of an erroneous deprivation of the debtor's interest.

3. Government's Interest

¶98 Application of the *Mathews* test also entails weighing the state's interest in the post-judgment execution process, including the fiscal and administrative burdens which may be imposed on the state by requiring additional procedural safeguards. Clearly, the state has an interest in enforcing its laws and in preserving the integrity of the judicial system through enforcement of court judgments. That interest includes protecting a judgment creditor's ability to collect on an adjudicated debt, while conserving the limited financial and administrative resources available to it. The state's interest also must encompass

a judgment debtor's entitlement to statutory exemptions from execution, however, in order to avoid favoring one party's legal rights over those of the other.

¶99 A requirement that judgment debtors be given notice of a seizure of their property pursuant to a writ of execution, notice of statutory exemptions from execution, and notice of procedures by which to claim exemptions from execution and receive a hearing on those exemption claims would further the state's interest in protecting the debtor's right to the exemptions without significantly impacting on the creditor's interest in satisfying the judgment, since the creditor is not entitled to execution on exempt property. Nor would the state's fiscal and administrative burdens be significantly increased, since the notice of property seizures, availability of exemptions and procedures by which to claim exemptions would require only the printing of new, or revising of old, writ of execution forms.

¶100 It is clear, however, that requiring a prompt hearing on a judgment debtor's claim that property is exempt from execution affects the state's interests by adding to both its administrative and fiscal responsibilities. This is especially apparent in the additional burden placed upon the state's judicial system by requiring prompt hearings and disposition of the debtor's claims.

4. Balancing the *Mathews* Factors

¶101 We determined above that additional procedural requirements in the execution process would be valuable in reducing the risk of an erroneous deprivation of a judgment debtor's interest in, the ability to claim and benefit from statutory exemptions from execution. The first three requirements are notices to judgment debtors of the seizure of their property under a writ of execution, either at the time of the seizure or shortly thereafter; of the availability of exemptions from execution and where information about those exemptions can be found; and of procedures by which to claim exemptions and receive a hearing on

those claims. Providing this information to debtors would protect their property right in claiming statutory exemptions from execution, yet not preclude the judgment creditor from proceeding with an execution sale of any nonexempt property. Furthermore, the burden placed on the state by requiring these notices is slight. It amounts to nothing more than notifying the judgment debtor that particular property has been seized and including information about available exemptions from execution and the existence of procedures by which to claim them in the writ of execution itself. Moreover, the notice of available exemptions need not include a detailed and exhaustive list of all exemptions; it need merely provide notice of the existence of exemptions from execution and how to locate more information about them. *See, e.g., Aacen*, 944 F.2d at 698. We conclude that, in weighing the interests of the parties involved in execution proceedings, the interest of the judgment debtor in claiming property exemptions substantially outweighs any burden placed on the creditor or the state by these additional notice requirements.

¶102 The final requirement we determined would be beneficial in reducing the risk of erroneously depriving a judgment debtor of his or her interest in claiming exemptions from execution is a prompt hearing and disposition of exemption claims. Such a requirement clearly benefits both the debtor and the creditor by reducing the time involved in resolving their respective claims to the property at issue and furthers the state's interest in the integrity of the judicial system. While the requirement of a prompt hearing increases the state's administrative and fiscal burdens, it also advances the state's interests in both protecting the debtor's interest in effectively claiming exemptions from execution and the creditor's interest in timely satisfying the judgment. *See Kirby*, 722 F.Supp. at 523. In light of the judgment debtor's property interest in the ability to claim exemptions from execution, the debtor's strong interest in retaining — or recovering — property which is exempt from execution and the risk that, absent a prompt hearing on the exemption claims, the debtor

will be unnecessarily deprived of exempt property for a substantial period of time, we conclude that the debtor's interests here outweigh the cost, both fiscally and administratively, imposed upon the state.

¶103 In summary, we conclude that Montana's post-judgment execution statutes violate state and federal constitutional guarantees of due process of law because they do not provide for notice to a judgment debtor of the seizure of the debtor's property, of the availability of statutory exemptions from execution and where to locate additional information about them, and of the availability of procedures by which to claim exemptions from execution. We further conclude that the statutes are deficient from a due process standpoint because they do not provide for a prompt hearing on claimed exemptions. As a result, we hold that the District Court did not err in determining that Montana's post-judgment execution statutes are unconstitutional because they do not provide the procedural due process of law required by Article II, Section 17 of the Montana Constitution and the Fourteenth Amendment to the United States Constitution.

¶104 3. Are Caraway and Ames entitled to qualified immunity from individual liability for Dorwart's § 1983 claims?

¶105 The District Court concluded that Caraway and Ames were entitled to qualified immunity from individual liability for Dorwart's due process claims based on its determination that the constitutional notice-related rights which were violated were not clearly established at the time the deputies acted pursuant to the writs of execution and because the deputies could not reasonably have understood that their actions violated Dorwart's rights. As a result of its erroneous determination that Caraway and Ames did not violate Dorwart's search and seizure rights, the District Court did not address whether they were entitled to qualified immunity for entering his residence and seizing his property. Dorwart contends that the District Court's qualified immunity conclusion regarding his due process claim was erroneous and

that the deputies also are not entitled to qualified immunity on his search and seizure claim. Therefore, we address qualified immunity vis-a-vis both the due process claim and the search and seizure claim.

¶106 Dorwart's due process claim requested only a declaratory judgment and permanent injunction. He did not seek monetary damages for that claim. Qualified immunity is a defense to damages liability; it is not available in actions for declaratory or injunctive relief. American Fire, Theft and Collision Managers, Inc. v. Gillespie (9th Cir. 1991), 932 F.2d 816, 818. Therefore, we conclude that the District Court erred in applying qualified immunity in the context of Dorwart's due process claim.

¶107 Qualified immunity shields government officials performing discretionary functions from liability for civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald (1982), 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410. In analyzing whether an official is entitled to qualified immunity, a court must identify the right violated, determine whether the right was clearly established at the time of the violation and, if the right was clearly established, determine whether a reasonable person or official would have known that his or her conduct violated that right. Hamilton v. Endell (1992), 981 F.2d 1062, 1066; Orozco v. Day (1997), 281 Mont. 341, 350, 934 P.2d 1009, 1014. In this regard, a plaintiff has the initial burden of proving that the right was clearly established at the time of the violation. If — but only if — the plaintiff makes this showing, the burden shifts to the defendant asserting qualified immunity to prove that his or her conduct was reasonable even though it violated the law. *See Hamilton*, 981 F.2d at 1066.

¶108 Dorwart correctly asserts that he had a clearly established constitutional right to be free from searches and seizures in his home in the absence of a search warrant or one of the

exceptions to the warrant requirement. *See* U.S. Const. amend. IV; Art. II, Sec. 11, Mont. Const.; State v. Bullock (1995), 272 Mont. 361, 374, 901 P.2d 61, 70. This general statement of the right to be free from unreasonable searches and seizures is too broad, however, for purposes of determining the "clearly established right" portion of the qualified immunity determination under given circumstances. Rather, the right which has been violated must be clearly established in a more particularized, relevant sense. *See Aacen*, 944 F.2d at 701; Anderson v. Creighton (1987), 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523, 531. While a plaintiff need not show that the specific action in question previously has been held unlawful, it must be demonstrated that, under the particular circumstances of the case and in light of pre-existing law, the unlawfulness of the action taken was apparent. *Anderson*, 483 U.S. at 640. Under the circumstances of this case, Dorwart must demonstrate that, at the time the deputies entered his home, it was clearly established that the writs of execution did not authorize their entry in the absence of a warrant or an established exception to the warrant requirement and that, as a result, they violated his right to be free from unreasonable searches and seizures.

¶109 In this regard, the specific issue presented and resolved above — whether a writ of execution, in and of itself, authorizes officers to enter a person's home and seize property therein — is one of first impression in Montana. In the only other Montana case addressing the extent of an official's authority when acting pursuant to a writ, we concluded that a writ of attachment provides an official with "the right to enter a business place against the will of the occupant, permission having been asked and refused, and to seize the property therein belonging to the occupant and subject to levy." *Ramsey*, 27 Mont. at 156, 69 P. at 712. Our 1902 decision in *Ramsey* is the only Montana case interpreting the scope of authority derived from a writ directing a levy on property. While *Ramsey* did not address or resolve whether such an entry would survive constitutional scrutiny, it

certainly appeared to authorize an official acting pursuant to a writ directing the levy on a person's property to enter and take possession of the premises in which property subject to execution was located in order to effectuate the execution without the necessity of a warrant.

¶110 Moreover, while the cases on which we relied in resolving issue one above — *Camara*, *G.M. Leasing* and *Hinchey* — had been decided prior to Ames' and Caraway's unlawful entry into Dorwart's home, it would not have been clear that we would interpret those cases as supporting our conclusion that the deputies' actions violated Dorwart's constitutional rights. *Camara* and *G.M. Leasing*, while providing guidance in addressing the scope of warrantless administrative searches and seizures, did not directly address actions taken pursuant to a writ of execution. Indeed, in neither case did there appear to be any type of judicial authorization for entry into the complainant's premises. *See Camara*, 387 U.S. at 526; *G.M. Leasing*, 429 U.S. at 344-46. Furthermore, while *Hinchey* directly addressed the issue raised in the present case, it is merely persuasive authority, not binding precedent.

¶111 Additionally, the Supreme Court previously had expressly stated that an officer's entry into private premises to levy on property pursuant to a writ of execution is not subject to Fourth Amendment constraints. *See Boyd*, 116 U.S. at 624. While we determined above that *Boyd* does not control our resolution of the search and seizure issue before us, the Supreme Court has never expressly overruled that portion of *Boyd* and, thus, it remained a potential source of authority on which to base a conclusion that Ames and Caraway did not violate Dorwart's rights when they entered his home.

¶112 We conclude that, under the law as it existed at the time Ames and Caraway entered Dorwart's home and levied upon his property, it was not clearly established that the writs of execution pursuant to which the deputies acted did not, in and of them-

selves, authorize entry into a private residence or that their entry pursuant only to the writs of execution violated Dorwart's right to be free from unreasonable searches and seizures. Because Dorwart has not satisfied his initial burden of proving that the right which the deputies violated was clearly established at the time of the violation, we need not address whether it was objectively reasonable for Ames and Caraway to believe their conduct was lawful. *See Hamilton*, 981 F.2d at 1066. We hold that Caraway and Ames are entitled to qualified immunity from individual liability for Dorwart's § 1983 search and seizure claim.

¶113 4. Did the District Court err in granting summary judgment in favor of Stillwater County and Brophy, in his capacity as Sheriff, on Dorwart's § 1983 search and seizure claim?

¶114 As we stated above in addressing the search and seizure issue, § 1983 provides a cause of action for a person who is deprived of a federally protected right by another person acting under color of state law. 42 U.S.C. § 1983; *Mysse*, 279 Mont. at 260, 926 P.2d at 769. Generally, § 1983 claims are brought against public officials in their individual capacities for their actions taken under color of state law. *See Orozco*, 281 Mont. at 348, 934 P.2d at 1013. However, municipalities and local governmental entities also may be sued as "persons" under § 1983. *Orozco*, 281 Mont. at 347, 934 P.2d at 1012.

¶115 A local governmental entity may be held liable under § 1983 only when it is shown that the entity itself caused the constitutional violation at issue through the implementation of a policy or custom of that governmental entity. City of Canton, Ohio v. Harris (1989), 489 U.S. 378,385, 109 S.Ct. 1197, 1203, 103 L.Ed.2d 412, 424 (citing Monell v. New York City Dept. of Social Services (1978), 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611). Thus, in order to impose liability on a local governmental entity under § 1983, a plaintiff must establish

> "(1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy 'amounts to deliberate indifference' to the plaintiffs constitutional right; and (4) that the policy is the 'moving force behind the constitutional violation.'"

Buhr on Behalf of Lloyd v. Flathead County (1994), 268 Mont. 223, 239, 886 P.2d 381, 390 (quoting Oviatt By and Through Waugh v. Pearce (9th Cir. 1992), 954 F.2d .1470, 1474). Similarly, a supervisor, such as Brophy here, cannot be held liable under § 1983 unless it is demonstrated that the supervisor's adoption of a plan or policy authorized or approved of the conduct alleged to have resulted in the constitutional deprivation. *See* Bergquist v. County of Cochise (9th Cir. 1986), 806 F.2d 1364, 1369-70.

¶116 The District Court determined that Dorwart failed to demonstrate that either Stillwater County or Brophy had adopted policies regarding levy and execution under a writ of execution other than the "policy" of relying on Montana statutes and, therefore, that Dorwart had not established the elements set out in *Buhr*. On that basis, it concluded that Dorwart's § 1983 claims against Stillwater County — and, by implication, Brophy — failed as a matter of law. We note that the only § 1983 claim on which Dorwart has prevailed is his claim that Caraway and Ames violated his Fourth Amendment rights when they entered his home and seized his property and, as a result, we review the District Court's conclusion here only as it relates to this search and seizure claim.

¶117 Dorwart argues that the District Court's conclusion was erroneous because he established that the actions of Ames and Caraway in entering his residence and seizing his property were carried out in the usual and customary manner of the Stillwater County Sheriffs Office. He further asserts that this customary procedure was the policy which resulted in the deprivation of his constitutional rights and that, by allowing deputies to proceed

under this policy, Brophy and Stillwater County failed to adequately train and supervise the deputies. According to Dorwart, this failure to train and supervise amounted to "deliberate indifference" to his constitutional rights. We disagree.

¶118 A governmental entity's failure to adequately train or supervise its law enforcement officers may be the basis of § 1983 liability when that failure to train or supervise amounts to deliberate indifference to the rights of persons with whom the officers come into contact. *Harris*, 489 U.S. at 388. However, "deliberate indifference" in this context occurs only when the need for different action is so obvious, and the inadequacy of the procedure used is so likely to result in violations of constitutional rights, that it is reasonable to say the policymakers were deliberately indifferent to the need to change the policy. *Buhr*, 268 Mont. at 240, 886 P.2d at 391 (citations omitted); *Harris*, 489, U.S. at 390. Thus, in order for Dorwart to satisfy the deliberate indifference element for imposing liability under § 1983, he must establish that Stillwater County's customary procedures for serving and executing a writ of execution, as implemented by Ames and Caraway in this case, obviously were constitutionally inadequate and that Stillwater County and Brophy were deliberately indifferent to the need to remedy those procedural inadequacies.

¶119 As we discussed above in addressing the issue of qualified immunity, it was not clearly established prior to this case that a law enforcement officer's entry into a person's residence and seizure of property therein pursuant solely to a writ of execution violates the person 5 constitutional right to be free from unreasonable searches and seizures. Montana statutes governing post-judgment execution procedures do not define the extent of an officer's authority when executing a writ of execution. Moreover, the only Montana case addressing the extent of implied authority under a writ held that the officer was authorized to enter premises against the will of the occupant and levy

upon property located therein. *See Ramsey*, 27 Mont. at 156, 69 P. at 712.

¶120 We conclude that when Ames and Caraway entered Dorwart's residence and seized his property, the constitutional inadequacy of Stillwater County's customary procedures for executing a writ of execution was not obvious and, as a result, Stillwater County and Brophy were not deliberately indifferent to the need to remedy the inadequacies we have now determined exist. Thus, Dorwart has failed to establish the necessary "deliberate indifference" element, as required under *Buhr*, for imposing § 1983 liability on a governmental entity. We hold, therefore, that the District Court did not err in granting summary judgment in favor of Stillwater County and Brophy, in his capacity as Sheriff, on Dorwart's § 1983 search and seizure claim.

¶121 5. Did the District Court err in granting summary judgment in favor of the County on Dorwart's conversion and trespass claims and Harry Dorwart's trespass claim?

¶122 In the amended complaint, Dorwart and his father asserted conversion and trespass claims against the County. The District Court granted summary judgment in favor of the County on these claims on the basis that, since it had determined that the writs of execution authorized Ames and Caraway to enter Dorwart's residence and levy upon his property therein, Dorwart could not establish the unauthorized entry element of a trespass claim or the unauthorized seizure of control over property element of a conversion claim.

¶123 Dorwart argues that, because the District Court erred in determining that the writs of execution authorized the deputies to enter his residence and seize his property, the court also erred in determining as a matter of law that the "unauthorized" elements of his tort claims could not be established. He contends

that, in the event this Court holds — as we have above — that the writs of execution did not authorize Ames and Caraway to enter his residence and seize his property, his trespass and conversion claims are viable and should be reinstated. We agree that, given our holding on issue one, the basis on which the District Court concluded that Dorwart and his father could not establish their tort claims is incorrect.

¶124 The County reiterates here, however, the alternative argument it raised in the District Court with regard to the tort claims. According to the County, Dorwart's tort claims still fail because the deputies were justified in their execution of writs which were regular on their face, issued by competent authority and appeared, at the time, to authorize the deputies' actions. In this regard, the County essentially contends that Ames and Caraway could not reasonably have understood that their actions were not authorized by the writs of execution and, therefore, none of the defendants should be liable for damages. The District Court did not reach this argument because of its ruling that the writs authorized the deputies' actions. However, we will "affirm district court decisions which are correct regardless of the court's reasoning in reaching the decision." *Clark*, 279 Mont. at 286, 927 P.2d at 999 (citation omitted). Thus, we examine the County's alternative argument.

¶125 We previously have held that actions of law enforcement officers cannot be tortious when the officers are proceeding on the basis of a reasonable, good faith understanding of the law and do not act with unreasonable violence or subject citizens to unusual indignity. Strung v. Anderson (Mont. 1975), 529 P.2d 1380, 1382 (citing Daly v. Pedersen (D. Minn. 1967), 278 F.Supp. 88, 93; Harri v. Isaac (1940), 111 Mont. 152, 107 P.2d 137; Wheeler v. Moe (1973), 163 Mont. 154, 515 P.2d 679; Meinecke v. McFarland (1949), 122 Mont. 515, 206 P.2d 1012). We further opined that "it would put too great a burden on law enforcement officers to make them subject to damages every

time they miscalculated in what a court of last resort would determine constituted an invasion of constitutional rights." *Strung*, 529 P.2d at 1381.

¶126 We held above that, at the time Ames and Caraway acted pursuant to the writs of execution, it was not clearly established that their actions violated Dorwart's constitutional rights. Thus, when the deputies entered Dorwart's home to execute the writs of execution according to procedures which appeared to be appropriate under then-existing Montana law, they were acting on a "reasonable, good faith understanding of the law." *See Strung*, 529 P.2d at 1382. Furthermore, Dorwart has not alleged — and the record does not suggest — that the deputies acted with unreasonable violence or subjected him to unusual indignity. *Strung*, 529 P.2d at 1382. We conclude, therefore, that the actions of Ames and Caraway in entering Dorwart's residence and levying upon property therein were not tortious as a matter of law.

¶127 We hold that the District Court did not err in granting summary judgment in favor of the County on the state law tort claims for conversion and trespass asserted by Dorwart and his father.

¶128 6. Did the District Court err in concluding that Dorwart is not entitled to attorney's fees?

¶129 The District Court determined that the only statute under which Dorwart potentially could be awarded attorney's fees was 42 U.S.C. § 1988 (§ 1988), which provides that a prevailing claimant in an action brought pursuant to § 1983 may be awarded attorney's fees at the court's discretion. The court concluded that Dorwart was not entitled to attorney's fees for Dorwart's § 1983 search and seizure claim based on its erroneous determination that the deputies' actions had not violated Dorwart's right to be free from unreasonable searches and seizures. While the District Court erred in denying Dorwart attorney's fees on that basis, we

conclude that its overall determination that Dorwart is not entitled to attorney's fees under § 1988 is correct. We will affirm a district court's decision which is correct regardless of the court's reason for that decision. *Clark*, 279 Mont. at 286, 927 P.2d at 999 (citation omitted).

¶130 Dorwart has prevailed on his claim that the County's actions violated his right to be free from unreasonable searches and seizures under the Montana and United States Constitutions. He argues that, insofar as his search and seizure claim established a violation of the Fourth Amendment to the United States Constitution for purposes of a § 1983 action, he is entitled to attorney's fees pursuant to § 1988.

¶131 It is true that a successful § 1983 claimant may be awarded attorney's fees under § 1988 regardless of the fact that qualified immunity prevents liability for monetary damages. *See* Jackson v. Galan (5th Cir. 1989), 868 F.2d 165, 168 (citing Pulliam v. Allen (1984), 466 U.S. 522, 543-44, 104 S.Ct. 1970, 1981-82, 80 L.Ed.2d 565, 580). However, there are cases where attorney's fees should be denied because special circumstances exist which would render an award of attorney's fees unjust. Blanchard v. Bergeron (1989), 489 U.S. 87, 89, 109 S.Ct. 939, 942, 103 L.Ed.2d 67, 72 (citing Newman v. Piggie Park Enterprises, Inc. (1968), 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263, 1266). We conclude that such special circumstances exist in the present case.

¶132 Where a § 1983 claim is derived from the actions of a county and its officers in enforcing or following state laws and, thereby, effectuating state policy, that county and its officers should not be subject to liability for attorney's fees resulting from the claim. *See, e.g.*, Familias Unidas v. Briscoe (5th Cir. 1980), 619 F.2d 391, 406; Minnesota Council of Dog Clubs v. City of Minneapolis (Minn. Ct. App. 1995), 540 N.W.2d 903, 906. The actions taken by Ames and Caraway in executing the writs at issue here were pursuant to Stillwater County's custom-

ary procedures for the execution of a writ issued in conformance with the Montana execution statutes. Indeed, in levying upon Dorwart's personal property, the deputies were enforcing the public policy of Montana regarding post-judgment executions as set forth in statutes duly enacted by the Legislature and they were, therefore, effectuating state policy rather than a policy promulgated by the County. As a result, we conclude that awarding attorney's fees against the County for Dorwart's § 1983 search and seizure claim would be unjust.

¶133 Dorwart also has prevailed on his declaratory judgment action seeking a declaration that Montana's post-judgment execution statutes are unconstitutional because they do not provide adequate due process of law, and he asserts that he is entitled to attorney's fees on that claim. Montana has long followed the rule that attorney's fees will not be awarded to a prevailing party absent statutory or contractual authority for such an award. Tanner v. Dream Island, Inc. (1996), 275 Mont. 414, 429, 913 P.2d 641, 650. No statute authorizes an award of attorney's fees in a declaratory judgment action. McKamey v. State (1994), 268 Mont. 137, 148, 885 P.2d 515, 522. Furthermore, no contract authorizes such an award in this case. Thus, we conclude that Dorwart is not entitled to attorney's fees for prevailing on his claim brought under Montana's Uniform Declaratory Judgments Act.

¶134 Dorwart also argues that he is entitled to attorney's fees for prevailing on the search and seizure and privacy claims he brought under Article II, Sections 10 and 11 of the Montana Constitution. As discussed above, the District Court's consideration of Dorwart's state constitutional claims terminated prematurely as a result of its erroneous determination that no state constitutional violations had occurred. The same is true with regard to the court's consideration of Dorwart's attorney's fees arguments regarding those claims. Thus, we conclude that Dorwart's arguments regarding entitlement to attorney's fees on

his claims under Article II, Sections 10 and 11 of the Montana Constitution must be remanded in conjunction with our remand of those constitutional claims for further proceedings.

¶135 Affirmed in part, reversed in part and remanded for further proceedings.

/s/ Karla M. Gray
Justice

We concur:

/s/ J.A. Turnage
Chief Justice

/s/ James C. Nelson

/s/ James M. Regnier

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Justices

Justice W. William Leaphart, specially concurring.

¶136 I concur in the Court's resolution of Issues 1, 2, 4, 5 and 6. I specially concur as to Issue Number 3: qualified immunity. As the Court recognizes, in analyzing whether an official is entitled to qualified immunity, a court must identify the right violated, determine whether the right was clearly established at the time of the violation and, if the right was clearly established, determine whether a reasonable person or official would have known that his or her conduct violated that right. Hamilton v. Endell (1992), 981 F.2d 1062, 1066; Orozco v. Day (1997), 281 Mont. 341, 350, 934 P.2d 1009, 1014. The Court then goes on to apply qualified immunity based on its conclusion that, given the state of case law as of the time of the defendants' entry into

Dorwart's home, it was not clearly established that an entry into Dorwart's home pursuant to a writ of execution violated his right to be free from unreasonable searches and seizures.

¶137 I, too, would find qualified immunity but for somewhat different reasons. "Qualified immunity 'gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.'" Boreen v. Christensen (1996), 280 Mont. 378, 383-84, 930 P.2d 67, 70 (quoting Hunter v. Bryant (1991), 502 U.S. 224, 229, 112 S.Ct. 534,537, 116 L.Ed.2d 589, 596 (citation omitted)). I would conclude that the right to be free from unreasonable searches and seizures is (and was) clearly established under Article II, Section 11 of the Montana Constitution, but that, given the state of the case law as of the date of the entry and given that the process utilized by Ames and Caraway is the same as has been used by levying officers in this state since territorial days, a reasonable person or official would not have known that his or her conduct violated that right.

/s/ W. William Leaphart
Justice

Justice Terry N. Trieweiler specially concurring in part and dissenting in part.

¶138 I concur with the majority's conclusion that when Caraway and Ames entered Russell Dorwart's residence without a warrant and without permission, they violated his right to be free from unreasonable searches and seizures, which is guaranteed by both the Fourth Amendment to the Federal Constitution, and Article II, Section 11, of the Montana Constitution. I also concur with the majority's conclusion that Montana's post-judgment execution statutes deny procedural due process in violation of the Fourteenth Amendment to the Federal Constitution, and Article II, Section 17, of the Montana Constitution, and that

implementation of those procedural protections described by the majority is necessary to meet due process requirements.

¶139 However, I dissent from those parts of the majority opinion which conclude that Ames, and Caraway were entitled to qualified immunity, that the § 1983 claim against Brophy and Stillwater County was properly dismissed, and that the plaintiffs' claims for trespass and conversion were properly dismissed.

¶140 The majority opinion begins with a cogent explanation of why Dorwart's right to be free from unreasonable searches and seizures was clearly violated, and then repudiates its own analysis in an effort to support its conclusion that in spite of the violation of Dorwart's constitutional rights, those who violated them have qualified immunity because the rights are not as evident as originally stated.

¶ 141 For example, the majority correctly points out that both the Fourth Amendment to the United States Constitution, and Article II, Section 11, of the Montana Constitution, guarantee to all people the right to be secure in their homes against unreasonable searches and seizures, as well as the fact that we have repeatedly held for years that entry into a person's home without a warrant is per se unreasonable, with a few exceptions that are inapplicable here.

¶142 The majority also correctly points out that neither the writs which were issued in this case, nor the post-judgment execution statutes pursuant to which the writs were issued, authorize entry into a person's home for the purpose of executing on property in satisfaction of the creditor's judgment.

¶143 Finally, the majority correctly points out that search and seizure protections apply in the civil context, as well as the criminal context, that that principle has been clear since 1967, and that all of the authorities relied on by the defendants and the State of Montana are distinguishable by their facts.

¶144 In spite of all of these clearly correct conclusions, the majority then holds that

> *Camara* and *G.M. Leasing*, while providing guidance in addressing the scope of warrantless administrative searches and seizures, did not directly address actions taken pursuant to a writ of execution. Indeed, in neither case did there appear to be any type of judicial authorization for entry into the complainant's premises.

What difference did it make if *Camara* and *G.M Leasing* specifically dealt with writs of execution? They dealt with the issue of warrantless searches in a civil context and held that the Constitution was violated when there was no judicial authorization for the search. The writs in this case were no different because, as pointed out in another part of the majority opinion, they did not authorize the defendants to search Dorwart's home.

¶145 With the majority's decision, the exception of qualified immunity has now completely swallowed the rule of liability for violating another person's civil rights in Montana. If the right to be free from unreasonable searches and seizures, based on the Fourth Amendment to the United States Constitution, and Article II, Section 11, of the Montana Constitution, is not a clear right, then nothing is.

¶146 Because the obligation of state agents to stay out of people's homes without a warrant is so clearly set forth in the Federal and State Constitutions, it was incumbent upon the State to show some clear decision, statute, or other colorable authority which would have allowed entry into the plaintiffs home in spite of that constitutional right on the date in question. None has been offered, and the majority cites none. In fact, as previously mentioned, the majority has done a capable job of distinguishing those authorities which have been cited by the defendants and the State.

¶147 The majority has imposed an impossible burden on the plaintiffs, which is to establish that some isolated decision or encyclopedic text could not be construed by those who wish to violate a person's rights in support of their conduct. In other words, the plaintiffs have to prove a negative in order to establish that they had a right which the majority initially concedes is clearly established.

¶148 I also dissent from the majority's conclusion that Brophy, in his capacity as Sheriff, and Stillwater County were entitled to summary judgment dismissing Dorwart's § 1983 claim against them. A local governmental entity and a supervisor of persons acting under color of state law are liable, as noted by the majority, for violations of constitutional rights when the violation results from that governmental entity's or that supervisor's policy. In this case, in response to written interrogatories, each defendant answered that the actions complained of (i.e., the illegal search of Dorwart's home and seizure of property found therein) were "the usual and customary manner of performing a seizure on a writ of execution in the County of Stillwater, Montana." In other words, it was the County's policy, as implemented by Brophy, the supervisor for Ames and Caraway, to apply writs of execution as search warrants, in spite of the fact that no statute authorized their use for that purpose and the plain language on the face of the writ included no such authorization. I would conclude that this practice and policy of Brophy and Stillwater County constituted "deliberate indifference" to Dorwarts' constitutional rights. The majority's decision to affirm the dismissal of Brophy and Stillwater County is based on the same unsound conclusion on which its qualified immunity decision is based — i.e., that Dorwart had no clearly established right prior to this case to be free from warrantless entry into and search of his home. I believe that conclusion is incorrect, as applied to Brophy and Stillwater County, for the same reasons it was incorrect when used to justify the majority's qualified immunity conclusion.

¶149 I also dissent from the majority's conclusion that Dorwarts' claims for trespass and conversion were properly dismissed because the officers who entered the home without permission and without a warrant acted on the basis of a good faith understanding of the law. The majority position might have some merit if the writs, on their face, authorized entry into Dorwart's home for the purpose of their execution, or if the statutes pursuant to which the writs were issued authorized entry. However, neither is true. Furthermore, to suggest the ninety-six-year-old *Ramsey* decision, which did not even discuss the Fourth Amendment, provided cover for the illegal entry into Dorwart's home, in spite of subsequent U.S. Supreme Court decisions which clearly require a warrant, is the type of argument we would normally consider specious if made by a litigant appearing before this Court.

¶150 For all the same reasons set forth previously, I also dissent from the majority's denial of Dorwart's claim for attorney fees pursuant to 42 U.S.C. § 1988. However, it bears repeating that Dorwart's § 1983 claim was not based on the County's or its officers' enforcement of state laws. There were no state laws which authorized the entry into Dorwart's home without a warrant and without his permission. The majority acknowledged as much in the first part of its opinion. Therefore, its rationalization for denying Dorwart's attorney fees is especially inconsistent and unsound.

¶151 In summary, I concur with the majority's conclusions that Dorwart's rights to be free from unreasonable searches and seizures, to privacy, and to due process were violated. I dissent from the majority's conclusion that in spite of flagrant violations of Dorwart's constitutional rights, no one is accountable pursuant to 42 U.S.C. § 1983 because cover can be found in a nearly 100-year-old decision which had nothing to do with constitutional issues in the first place. I would reverse the District Court's

judgment which dismissed Dorwarts' claim for damages pursuant to 42 U.S.C. § 1983 and remand for trial of Dorwarts' claims.

/s/ Terry Trieweiler
Justice

Justice William E. Hunt, Sr., joins in the foregoing concurring and dissenting opinion.

/s/ William E. Hunt, Sr.
Justice

APPENDIX B

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT,
STILLWATER COUNTY

NO. DV 93-39

RUSSELL EDWARD DORWART
and HARRY DORWART,
Plaintiffs,

vs.

PAUL CARAWAY, individually, and as a deputy in the Stillwater County Sheriff's Office;
DANNY AMES, individually, and as a deputy in the Stillwater County Sheriff's Office;
CLIFF BROPHY, individually, and as Sheriff of Stillwater County, Montana;
and COUNTY OF STILLWATER, State of Montana,
Defendants.

MEMORANDUM AND ORDER

I. INTRODUCTION AND PLEADINGS

Defendants have filed a motion for summary judgment related to all issues. Plaintiff Russell Dorwart has filed a motion for partial summary judgment. Both motions have been fully submitted to the Court for decision. The case is submitted to the Court for decision based upon the pleadings, discovery information which has been filed and affidavits.

By reason of actions of some of the defendants which will be summarized in the fact portion of this memorandum plaintiffs filed a number of claims against defendants which are set forth in plaintiffs' first amended complaint and demand for jury trial. These claims can be summarized as follows:

1. Violation of the right of privacy (State Constitutional Claim).

2. Illegal search and seizure (State Constitutional Claim).

3. Violation of right of due process (State Constitutional Claim).

4. Trespass (State Law Claim).

5. Conversion (State Law Claim).

6. Negligent supervision (State Law Claim).

7. Trespass against owner (State Law Claim).

8. Unreasonable search and seizure. (Federal Constitutional Claim).

9. Violation of due process (Federal Constitutional Claim).

10. Declaratory judgment and injunction (Constitutional claims related to execution statutes and exemptions).

All claims are made by plaintiff Russell Dorwart other than the seventh claim for trespass against owner which is made by Harry Dorwart from whom Russell Dorwart rented his premises.

II. FACTS

Discovery has been filed which includes answers to interrogatories and requests for production. Affidavits have been filed of the attorney for defendants, Steven Milch, and the plaintiff, Russell Dorwart. A short summary of the facts that have not been disputed is the following.

Plaintiff Russell Dorwart (Dorwart), was the named defendant in two actions filed in the Small Claims Division of the Stillwater County Montana Justice Court. Plaintiff Russell Dorwart will be referred to as Dorwart. His father, Harry Dorwart, is also a plaintiff. He will be referred to as Harry Dorwart.

Judgments by default were entered against Dorwart in two small claims court division cases on February 19 and March 11, 1991. A writ of execution was issued by the justice court on March 12, 1991, to enforce the judgment against Dorwart in small claims court cause No. 90-203. A writ of execution was similarly issued on April 9, 1991, to enforce the judgment against Dorwart in small claims court cause No. 91-206. Copies of those writs are attached as Exs. E and F to the Milch affidavit.

On April 11, 1991, Dorwart was stopped on the highway by Deputy Sheriff Ames who claimed authority to do so by virtue of the writs of execution. Deputies seized Dorwart's truck and arrested him for DUI. Dorwart was served with the writs of execution.

According to Dorwart's affidavit after he was incarcerated in the Stillwater County Jail, Ames asked him whether his house was locked. Dorwart replied that one door was locked and the other door was not. Dorwart claims he was asked where his drivers license was located and he told Ames or Deputy Sheriff Caraway that it was on the dashboard of his mother's car in the driveway. Dorwart claims he was never asked by Ames or Caraway whether they could go into his house, garage or mother's car or that he ever gave them permission to do so.

According to Dorwart's affidavit, Ames and Caraway entered his house and took from that house various items of personal property which Dorwart claims belonged to him and others. He claims Ames and Caraway entered his garage and took possession of tools of trade and entered his mother's car and took his wallet which was on the dashboard. He was never given any information concerning what property would be exempt from execution, how a claim could be made of such exemption or the procedure available for doing so. He was not shown a warrant concerning a search of his house garage or mother's car. He claims that after he was arrested, Ames and Caraway seized his vehicle and locked it in a wrecking yard in Columbus. He claims

that his tools necessary for his trade were in the vehicle as well as his briefcase and that the vehicle and its contents were not returned to him until his release from jail on April 12, 1991. His wallet was also returned to him on that day. He claims he was provided with a list of property seized from his house. He consulted with his attorney and filed an affidavit of exemption attached to his affidavit as Ex. D. The affidavit was mailed for filing on April 18, 1991. He claims documents were filed on that date in justice court to claim release of the exempt property. He claims certain items of property were not his property but owned by others. On September 30, 1991, justice court entered its order that all of the property seized by Ames and Caraway be returned to the rightful owners. He claims that his attorney received a copy of that order on October 7, 1991. Dorwart subsequently went to the jail, retrieved his property and the property claimed to be owned by others. No one, other than his attorney, gave him any information on how to claim exempt property.

Further facts will be referred to in the remainder of this opinion.

III. APPLICABLE STATUTES

The following are applicable statutes related to executions and exemptions relevant to this case. Section 25-13-201 M.C.A. provides:

> **Judgments for money or for the possession of property**. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment directed that the defendant be arrested, the execution may issue against the person of the judgment debtor after the return of an execution against his property in whole or in part.

Section 25-13-301 M.C.A. provides:

> **Form and contents of writ.** (1) The writ of execution must: (a) be issued in the name of the state of Montana, sealed with the seal of the court, and subscribed by the clerk;
>
> (b) be directed to the sheriff or levying officer;
>
> (c) intelligibly refer to the judgment, stating the court and the county where it was entered and, if it is for money, the amount thereof and the amount actually due thereon; and
>
> (d) require the sheriff or levying officer to act substantially as provided in this part.
>
> (2) In executions, the amount thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent.

Section 25-13-304 M.C.A. provides:

> **Execution against property of judgment debtor**. If the writ be against the property of the judgment debtor, it shall require the sheriff or levying officer to satisfy the judgment, with interest, out of the personal property of such debtor and, if sufficient personal property cannot be found, out of his real property as provided in 25-13-305.

Section 25-13-501 M.C.A. provides:

> **What property subject to execution**. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action are liable to execution. Shares and interest in any corporation or company, debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery may be attached on execution,

in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

Section 25-13-609 M.C.A. provides:

Personal property exempt subject to value limitations.

A judgment debtor is entitled to exemption from execution of the following:

(1) the judgment debtor's interest, not to exceed $4,500 in aggregate value, to the extent of a value not exceeding $600 in any item of property, in household furnishings and goods, appliances, jewelry, wearing apparel, books, firearms and other sporting goods, animals, feed, crops, and musical instruments;

(2) the judgment debtor's interest, not to exceed $1,200 in value, in one motor vehicle;

(3) the judgment debtor's interest, not to exceed $3,000 in aggregate value, in any implements, professional books, and tools, of the trade of the judgment debtor or a dependent of the judgment debtor; and

(4) the judgment debtor's interest, not to exceed $4,000 in value in any unmatured life insurance contracts owned by him.

IV. DISCUSSION

A. *Standards for Summary Judgment*

The standards for this Court in considering motions for summary judgment were succinctly stated by the Montana Supreme Court in *Thomas v. Hale*, 246 Mont. 64, 66-67, 802 P.2d 1255,1256-57, (1990):

Summary judgment should be granted if the moving party successfully carries its burden to establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c) M.R.Civ.P. To satisfy its burden of proof, the movant must provide the court with evidence which clearly indicates what the truth is, and which excludes any real doubts as to the existence of a genuine issue of material fact. *Van Uden v. Hendricksen* 189 Mont. 164, 167, 615 P.2d 220, 222, (1980). Once the movant has discharged this burden of proof, the party opposing the matter must come forward with substantial evidence raising a genuine issue of material fact. Rule 56(e), M.R.Civ.P.; *Riley v. Carl* 191 Mont. 128, 622 P.2d 228 (1981). Further, the non-moving party must set forth specific facts and cannot simply rely upon their pleadings, nor upon speculative, fanciful, or conclusory statements. *Simmons v. Jenkins*, 230 Mont. 429, 432, 750 P.2d 1067, 1069 (1988).

B. *Search and seizure, right of privacy, trespass and trespass against owner claims*

In the categories of claims covered by this subdivision of the opinion, plaintiffs are claiming that there was a warrantless search of Dorwart's rented premises not appropriately authorized by the writs of execution giving rise to these claims. All of the claims are made by Dorwart except the one claim made by Harry Dorwart concerning trespass to the property owned by him rented to Dorwart.

Dorwart contends that the entry upon his premises is not justified by the writs of execution alone. Taking the strongest case of Dorwart established by his affidavit, Ames and Caraway entered his premises peaceably by opening a door after being notified that it was not locked. Once in the premises they proceeded to take possession of certain personal property for purposes of execution.

Plaintiffs do not contend that the writs of execution were defective. Instead they contend that the judicially issued writs of execution, by themselves, were not sufficient authority to allow entry into Dorwart's residence.

A justice court is specifically authorized to issue writs of execution to enforce its judgments. The basic requirements for the form and content of a writ of execution in justice court is provided by Rule 23 M.J.C.C.R.Civ.P. Among other things the "[d]etermination of the amount of the judgment outstanding and the type, kind, description and location of the personal property of the judgment debtor is the exclusive duty of the judgment creditor." A writ must be directed to the sheriff or other levying officer of the county, must be subscribed by the judge and bear the date of its issuance. The form of the writs of execution here are in compliance with Montana statutes.

Montana statutes detail the requirements for writs of execution. Section 25-13-301 M.C.A. specifically addresses the form and content of a writ of execution. Montana statutes permit either of two types of execution: a general execution under Section 25-13-304 M.C.A. or a special execution under Section 25-13-307 M.C.A. The general writ of execution requires the levying officers "to satisfy the judgment, with interest, out of the personal property of such debtor and, if sufficient personal property cannot be found, out of his real property as provided in 25-13-305." Section 25-13-304 M.C.A. A special execution differs from a general execution in that the special execution requires the delivery of a specific item of the debtor's property to a third party. Here, both writs were of the general type even though the writ of execution for Cause No. 91-206 specifically specified Dorwart's pickup as the item of property to be executed on.

Writs of execution have a long tradition in the law. Most of the law developed around the turn of the century. In addition to the statutory powers authorized under a writ of execution, the implied powers authorized by the writ are extensive. "A writ of

execution gives to the officer every implied power necessary to its execution." 30 Am.Jur.2d *Executions* § 205, p. 160.

As stated at 30 Am.Jur.2d *Executions* § 213 p. 165:

> The levy of a writ of execution is an act in the course of a judicial proceeding. It has been described as an act of dominion over specific property by an authorized officer of the court which, but for the writ under which he proceeds, would be a trespass, conversion, or other unlawful invasion of a property right, and which results in the creation of a legal right to subject the debtor's interest in the property to the satisfaction of the debt of his judgment creditor, to the exclusion of others whose rights are inferior. Thus, the levy of execution is an absolute appropriation in law of the property levied upon to the payment of judgment debt.

That authority states further at 30 Am.Jur.2d *Executions* § 218 p. 168:

> An officer charged with the duty of enforcing a judgment by execution has the right to peaceably enter the premises of the execution debtor, and take with him such persons as he may need to assist him in performing his duty. Thus, an officer charged with the duty of enforcing a judgment by execution has the right to enter peaceably into the house of the execution debtor, and to take with him the execution creditor as an assistant. The debtor has no right to treat the officer or the creditor as a trespasser or to otherwise utilize force or the threat of force to prevent an officer's levy.

The majority of the case law supporting the secondary sources cited above is old. In some instances, the secondary sources fail to reveal the development of the law. In *Boyd v. United States*, 116 U.S. 616, 624, U.S. Ct. 524, 529 (1886) it was stated:

> The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by

> virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution.

However, that case has been criticized by a more recent case.

> The [*Boyd*] Court was not concerned with, and therefore did not explain, whether the "judicial writ" referred to above was necessary in order to meet the warrant requirements.

G.M. Leasing Corp. v. United States, 429 U.S. 338, 355, 97 S.Ct. 619, 630, n.20 (1977). In that case, the Court stated:

> We do not find in *Boyd* any direct holding that the warrant protections of the Fourth Amendment do not apply to invasions of privacy in furtherance of tax collection. Insofar as language in *Boyd* might be read so to state, we decline to follow those dicta into rejection of the basic governing principle that has shaped Fourth Amendment law.

G.M. Leasing Corp., 429 U.S. at 356, 97 S.Ct. at 630. Although the United States Supreme Court has criticized *Boyd*, the case still represents the law. Writs of execution do not necessarily invoke Fourth Amendment analysis.

In California, an officer charged with the duty of enforcing a judgment by execution has the right to enter the premises of the execution defendant if he can do so peaceably. *People v. Sylva*, 143 Cal. 62, __, 76 P. 814, 815 (1904). The Montana Supreme Court has agreed as to business premises in *Ramsey v. Burns*, 27 Mont. 154, 156, 69 P. 711, 712 (1902) where it stated:

> An officer has the right to enter a business place against the will of the occupant, permission having been asked and refused, and to seize the property therein belonging to the occupant and subject to levy.

Although dated, *Ramsey* represents the law in Montana.

Plaintiffs contend that the enforcement of the writs of execution constituted an unreasonable search and seizure because neither of the writs specifically stated that a home could be entered and searched. In support of their argument, Plaintiffs cite *Hamrick v. Ashland Finance Co. of West Virginia*, 423 F. Supp. 1033, 1036 (S.D. W.Va. 1976), which declared West Virginia's detinue statutes unconstitutional on "probable cause" grounds. In that case, a West Virginia justice of the peace issued an order to have property seized, and a constable entered the plaintiff's home and removed property pursuant to the order. Since no determination of the creditor's right to recover had been made, the court held that the Fourth Amendment's minimum requirements were applicable. *Id.*

Hamrick can be distinguished from the instant case because it dealt with a prejudgment seizure. In *Hamrick*, the fact that no judgment had been entered against the plaintiff meant that the plaintiff's property rights were protected. Here, Dorwart's property was seized pursuant to a post-judgment writ of execution. Unlike *Hamrick*, the creditor's right to recover from Dorwart had already been judicially determined. Therefore, Dorwart's property was subject to a judicial writ of execution, and his corresponding property rights were subordinated to such execution.

Plaintiffs' argument that a writ of execution should require the same detail as a search warrant fails as a matter of law. Here, the writs of execution met the statutory requirements. Although more information may have been helpful, the information provided in the writs of execution in this case met the statutory requirements.

Plaintiffs have not argued that the writs were defective on their face. Plaintiffs argue that the officers levying the writs exceeded their legal authority and violated the Fourth Amendment and Montana constitutional search and seizure and right of privacy provisions. Montana case law clearly states that a writ of execution empowers the officer to enter a defendant's premises and

seize property. *Ramsey v. Burns, supra*. Therefore, the officers in this case acted reasonably and with the appropriate authority granted to them under statutory and common law.

The entry into Dorwart's rented home and the levy upon personal property found therein was authorized by the judicial writs of execution. Those writs were regular on their face and were issued by a court having the requisite authority and jurisdiction to issue such writs. Consequently, the Stillwater County Sheriff's Department was justified, authorized, and compelled to obey the writs. *See Collins v. State, Dept. of Justice*, 232 Mont. 73, 80-81, 755 P.2d 1373, 1377 (1988) ("[A] ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued.") (quoting *Harris v. Isaac*, 111 Mont. 152, 157, 107 P.2d 137, 140 (1940)).

The essential elements for an action for conversion were stated by the Montana Supreme Court in *Gebhardt v. D.A. Davidson & Co.*, 203 Mont. 384, 389, 661 P.2d 855, 858 (1983), as follows:

> Conversion has been defined as a distinct act of dominion wrongfully exerted over one's property in denial of, or inconsistent with, the owner's right, . . . or an unauthorized assumption of dominion over the personalty in hostility to the right of the owner.

An action for trespass requires an unauthorized and unjustifiable entry upon the property of another. *See generally* W. Prosser, *The Law of Torts* § 25, at 129-131 (1971).

Here, the entry upon the premises rented by Dorwart and owned by Harry Dorwart and the levy upon personal property found therein was specifically authorized by the judicial writs of execution as discussed earlier in this subdivision of the opinion.

Consequently, no unauthorized acts occurred and the claims of conversion and trespass fail.

Montana's right of privacy is broader than the federal right, *State v. Sierra*, 214 Mont. 472, 692 P.2d 1273 (1985). However, this right isn't so broad that it encompasses the alleged violations in this case. Plaintiffs' constitutional claims based upon an invasion of privacy fail as a matter of law because no unreasonable search took place. *See Doe v. State, Dept. of Revenue*, 256 Mont. 348, 846 P.2d 1018 (1993) (search and seizure pursuant to a judicial search warrant did not violate claimants' Fourth Amendment rights, nor invade their right of privacy). Defendants actions were reasonable, within the scope of the law, and did not violate Plaintiffs' right of privacy. Defendants' motion for summary judgment should be granted as to plaintiff's first, second, fourth, fifth, seventh and eighth causes of action.

C. *Due process - levy on exempt property*

Dorwart contends that his due process rights were violated when defendants executed on his property because there was a seizure of exempt property in violation of Section 25-13-501 M.C.A. Dorwart claims that defendants could not seize property which was exempt under that statute. This claim is the first type of due process claim made by Dorwart and does not involve issues concerning notification of the right to claim exemptions and procedure for so doing. Due process issues concerning that matter will be discussed in a later subdivision of this opinion.

Section 25-13-501 M.C.A. has been quoted completely earlier in this opinion. In applicable part it provides that "property . . . or any interest therein of the judgment debtor, not exempt by law. . ." is liable to execution.

Both of the writs of execution in this case included the following directive:

> NOW, you the said Sheriff or Constable, are hereby required to make said sum due on the said judgment or damages, with interest aforesaid and costs and accruing costs, to satisfy the said judgment out of the PERSONAL PROPERTY of the said debtor NOT EXEMPT FROM EXECUTION on the day whereon said judgment was docketed in the said county, or at any time hereafter, and make return of this writ within 30 days after your receipt hereof with what you have done, endorsed thereon.

Plaintiffs correctly argue that only nonexempt property is subject to execution. However, Plaintiffs take their argument one step too far. Based on the premise that only nonexempt property is subject to execution, Plaintiffs argue that the levy never should have occurred in the first place. In other words, Plaintiffs contend that officers cannot levy on property that may eventually qualify as exempt under Section 25-13-309 M.C.A. This argument places the burden on the levying officer to determine which property may eventually qualify as exempt and, therefore cannot be levied upon.

Plaintiffs' argument fails for at least two reasons. First, Dorwart's due process rights at the time of seizure were minimal because the seized property lacked a vested property interest. Second, Dorwart's property had only been levied upon and the execution of Plaintiffs' property had not been completed.

1. Plaintiffs due process rights were minimal because they failed to file a claim of exemption.

At the time of the levy, Dorwart's due process rights were minimal. The creditors obtained judgments on their claims of indebtedness. Pursuant to the judgments, the Justice Court issued two general Writs of Execution. Consequently, all of Dorwart's property was subject to execution pursuant to Section 25-13-501 M.C.A. Dorwart lacked vested rights in the property that was subject to execution. The only way Dorwart may have

been afforded additional due process rights would have been to claim the property exempt or to attack the validity of the writs of execution and their underlying judgments. Here, Plaintiffs failed to utilize either of these additional protective remedies prior to the levy.

The exemption statutes are a personal privilege granted I by the legislature. *Tetrault v. Ingram*, 54 Mont. 524, 525, 171 P. 1148, 1149 (1918). Exemption rights do not arise automatically. The debtor must take some affirmative action in order to claim property to be exempt. *Matter of Estate of Sandvig*, 250 Mont. 220, 223, 819 P.2d 184, 185-86 (1991); *See also Layton v. Chase*, 144 N.W.2d 561 (S.D. 1966) (personal property exemptions provided by statute are not self-executing and burden is on debtor to make claim). In *Sandvig*, the appellants argued that Section 25-13-609(2) M.C.A., which exempts $1,200 in a motor vehicle, operated automatically and excused them from taking any affirmative steps to protect their interest. *Id.* The Montana Supreme Court disagreed even though Montana does not have a specific procedure on how a judgment debtor should claim certain property to be exempt. *See Id.* (citing *Tetrault*, 54 Mont. at 525, 171 P. 1149, and 11 U.S.C. § 522 (1988) (federal bankruptcy law requiring debtors to file a list of property claimed exempt)).

California law further demonstrates the unprotected status of Dorwart's property at the time of levy. Unlike Montana, California has both automatic and nonautomatic exemptions. *See Raigoza v. Sperl*, 110 Cal.Rptr. 296, 298, 34 Cal.App.3d 562, 563-64 (1973). In Montana, no exemption is automatic. The debtor must take some affirmative action in order to claim property to be exempt. *Sandvig*, 250 Mont. at 223, 819 P.2d at 185-186. Under Cal. Civ. Proc. Code § 690.6, 75% of a debtor's earnings are automatically not subject to levy — that is, are "exempt from execution without filing a claim for exemption." *Raigoza*, 110 Cal.Rptr. at 298, 34 Cal.App.3d at 563.

In California, the nonautomatic exemptions can be claimed as follows: "[t]o claim the exemption if allegedly exempt property is levied upon, the judgment debtor must file a claim of exemption within 10 days from the date of levy." *See, Raigoza v. Sperl*, 110 Cal.Rptr. at 298, 34 Cal.App.3d at 564. To avoid the expense of the execution procedure and to alleviate the hardship of a waiting period, a judgment debtor could well discourage the creditor from a futile execution by filing his affidavit of exemption with the depository immediately after the judgment is entered. *Phillips v. Bartolomie*, 121 Cal.Rprt. 56, 62, 46 Cal.App.3d 346, 354 (1975).

Considering the *Sandvig* rule that no exemptions in Montana are automatic, Dorwart failed to take the affirmative measures necessary to protect his property from execution prior to seizure. By failing to file a claim for exemption, Dorwart's property had not yet attained its "exempt" status and the corresponding due process protections prior to seizure. Therefore, his property rights at the time of seizure were minimal and his due process arguments fail.

2. Dorwart's contention that improper execution concerning his property fails because the execution had not been completed.

Dorwart's argument that the levy violated his due process rights is without merit for an additional reason. Dorwart contends that defendants cannot execute on exempt property. However, the execution had not completely taken place. Only the first step (levy) in the execution process had occurred. Two steps must occur for an execution to be complete. The general rules are stated as follows at 30 Am.Jur.2d *Executions* § 213 p. 164:

> The execution of a writ of execution consists of two acts, the levy, or taking property into the possession of the sheriff for sale, and the execution sale itself.

At the time of seizure, the execution wasn't complete since the sale of the property had not occurred. The property had been levied upon, but all of the proper post-deprivation remedies to prevent an unauthorized or erroneous execution of the property were still available to Plaintiffs.

Montana law does not provide a specific procedure on how a judgment debtor should claim property to be exempt. Montana case law recognizes two informal procedures for a debtor to assert his claim of exemption. First, the debtor can file a sworn claim with the officer making the levy, who if he retains the property, ordinarily demands an indemnity bond. *See Sandvig*, 250 Mont. at 223, 819 P.2d at 185-86 (1991); and *State ex rel. Bartol v. Justice of the Peace Court*, 102 Mont. 1, 5, 55 P.2d 691, 692-93 (1936). The officer then proceeds to sell the property, and an action for damages is brought against such officer or a claim and delivery suit is brought against the officer by the claimant prior to sale. *Id.* at 5. In the second option, the debtor can move as Dorwart did, with supporting affidavits or evidence, that the Justice of the Peace determine the validity of the claim for exemption as to property held under court process. *See State ex rel. Bartol, supra*, 102 Mont. at 5, 55 P.2d at 693 and *White v. Corbett, Justice of the Peace*, 101 Mont. 1, 4, 52 P.2d 156, 157 (1935). When asked for an opinion on the proper procedure to be followed by a Sheriff who has been presented with an exemption affidavit by the debtor, the Montana Attorney General concluded that:

> (1) the Sheriff may require an indemnity bond from the attachment creditor; (2) the Sheriff may request attachment debtors to file their exemption affidavits in the Justice Court for a determination of validity; and (3) if the debtor refuses to file the affidavit in court, the Sheriff is forced to determine the validity of the claim, but the Sheriff may require a bond of indemnity from the attachment plaintiff.

28 A.G. Op. 38 (1959).

Given the two steps necessary for a completed execution and the post-deprivation remedies above, Plaintiffs err in claiming that Dorwart's property had been improperly executed. No sale of Dorwart's property ever occurred, and therefore, no execution of exempt property ever took place. Moreover, plaintiffs successfully took advantage of a post-deprivation relief remedy.

D. *Due process - failure to give Dorwart notice of seizure, notice of exemptions, notice of availability of a hearing and a prompt hearing*

Dorwart asserts additional due process argument that the Montana statutes are unconstitutional or unconstitutionally applied here in violation of state and federal due process. Dorwart claims that the Montana statutes are unconstitutional because: (1) they do not advise a judgment debtor of the existence of any exemption rights; (2) they do not advise him of how to assert those exemption rights; (3) they allow seizures of exempt property without any pre-seizure notice and any opportunity for a hearing either before or after the seizure; (4) they contain no procedures for asserting those exemption rights; and (5) they provide no time limit for the determination of exemption rights and for the return of any exempt property.

Deprivation of property does not constitute a deprivation of due process if the state provides adequate post-deprivation remedies. *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 3204, (1984). While Montana statutes do not specifically provide any procedures for exempting property, Montana case law does provide two informal post-deprivation remedies. *See, e.g., Sandvig*, 250 Mont. at 223, 819 P.2d at 185-86; *State ex rel. Bartol*, 102 Mont. at 5, 55 P.2d at 692-93. Thus, the critical issue presented by Dorwart is whether Montana's statutory scheme and the two case law remedies are constitutionally adequate.

Constitutional challenges on due process grounds to post-judgment garnishment and execution statutes are a relative

recent development. Traditionally, due process did not require notice and an opportunity to be heard before the issuance of a writ to garnish a judgment debtor's wages. *Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 45 S.Ct. 61, 69 L.Ed. 288 (1924). It was the debtor's duty to take notice of what would follow. *Id.* at 288, 45 S.Ct. at 62. The debtor had already been given due process in the underlying court proceedings that resulted in the entry of judgment against him, no further due process requirements were owed to the debtor. *Id.* However, the court in *Endicott-Johnson Corp.* did not consider the possibility that the garnishment might deprive the judgment debtor of exempt property. *Finberg v. Sullivan*, 634 F.2d 50, 56-57 (3rd Cir. 1980).

In *Finberg* the court held Pennsylvania post-judgment garnishment statutes unconstitutional. In contrast to the situation in *Endicott-Johnson Corp., Finberg* recognized that potential exemptions may create additional concerns about a post-judgment debtors due process rights. *See Finberg*, 634 F.2d at 58. The Third Circuit pointed out that exemption statutes have primarily come into existence after the decision in *Endicott-Johnson. Finberg*, 634 F.2d at 56-57. The exemption statutes grant the debtor additional due process protection:

> Sterling's [the judgment creditor's] judgment represents only an adjudication of Mrs. Finberg's liability on a monetary debt, not a transfer to Sterling of title to any particular item of her property. Sterling could obtain a final adjudication of its right to seize her bank accounts only with the completion of the garnishment process. A debtor might still defeat that right with any number of defenses not adjudicated in the action on the merits, such as in the present case with a claim of exemption. Thus, the attachment remains a provisional measure, and the debtor retains a protectable interest in the use of her property during the pendency of the creditor's action.

Finberg, 634 F.2d at 58.

Given the principles established in *Endicott-Johnson*, the Third Circuit noted that notice and an opportunity to be heard were not absolutely necessary. *See Finberg*, 634 F.2d at 58. "However, the available procedures must afford the debtor adequate protection against erroneous or arbitrary seizures." To determine whether the procedural protection is adequate, the Third Circuit looked to the individual interests of the creditor and debtor. The weight given to those interests depended upon the facts of each particular case. Three factual observations were of importance to the Third Circuit. First, additional delay and expense can diminish the value of the creditor's ultimate recovery. Second, the ability to seize monetary assets advances the creditor's interests because an execution on such assets is generally faster and less expensive than a levy and judicial sale on nonmonetary assets. Third, (and what the court considered compelling) a bank account may contain the money that a person needs for food, shelter, health care, and other basic requirements of life. *Id.*

In light of the above interests, the Third Circuit recognized that due process required that Mrs. Finberg receive timely and adequate notice of the attempt to garnish her accounts. *Id.* at 61 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). The notice required by due process must be "reasonably calculated, under all the circumstances, to . . . afford [interested parties] an opportunity to present their objections." *Id.* at 61-62 (quoting *Mullane*, 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950)). The Third Circuit found that due process requirements for the content of the notice depended upon the circumstances of the particular case. *Finberg*, 634 F.2d at 62 (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 n.15, 98 S.Ct. 1554, 1563 (1978)). The circumstances in *Finberg* were that Mrs. Finberg was not informed of her exemptions, the exemptions were for basic necessities, the

knowledge of exemptions was not widespread, and a judgment debtor may not be in a position to consult a lawyer. *Finberg*, 634 F.2d at 62. In analyzing the circumstances, the court found that the conveyance of information regarding exemptions would not place a great burden on the state since the information could be included in the writ of execution. Therefore, the court held that the failure to provide this information violated due process. *Id.*

Finberg also held that the Pennsylvania post-judgment garnishment procedures did not provide for a prompt post-seizure hearing. *Id.* at 59. The court concluded that 15 days was too long a period to deprive a person of money needed for food, shelter, health care, and other basic needs. *Id.*

The next case after *Finberg* to hold a state's post-judgment garnishment statutes unconstitutional was *Deary v. Guardian Loan Company*, 534 F.2d 1178 (S.D.N.Y. 1982). In that case, Plaintiffs objected to the garnishment of their bank accounts. *Id.* at 1184. The court concluded that New York's "post-judgment enforcement procedures [were] constitutionally defective in failing to afford the judgment debtor adequate protection against erroneous restraint or execution." *Id.* at 1185.

> While the fact that in this case the creditors had obtained a judgment on their claims of indebtedness may alter the weight of the competing interests from those considered in pre-judgment cases, it cannot alter the method to be utilized in determining the procedural protections applicable in the enforcement context.

Id. at 1186. Additional factors to be weighed included the "probable value, if any, of additional or substitute safeguards," and the "fiscal or administrative burdens that the additional or substitute procedural requirements would entail." *Id.* at 1186-87 (quoting *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 Sup.Ct. 893, 903 (1976)). "[J]udgment debtors in the context of this case are entitled to notice of both the exemptions to which they may

be entitled and the procedures for asserting those exemptions." *Id.* at 1187. The post-judgment hearing was of little use since "[w]ithout notice of their possible exemptions, the enforcement action taken or contemplated, and the . . . procedures themselves, judgment debtors in this context are likely not to know that any relief may be available." *Id.* at 1188.

Following *Finberg* and *Deary* came *Dionne v. Bouley*, 757 F.2d 1344 (1st Cir. 1985). In that case, a social security beneficiary succeeded in challenging the validity of Rhode Island's statutory scheme for post-judgment attachment. *Id.* at 1354. Again, the court looked at the facts of the particular situation.

> To the needy heads of families and children dependent upon social security or other benefit programs, even the short-term deprivation of their main or only source of support can have disastrous consequences.

Id. at 1353. The court held that while the judgment resolves the issue of whether a debt exists, it does not address whether the creditor can seek satisfaction of the debt from this particular asset. *Id.* at 1352. Although the First Circuit declared that the state must give notice of available exemptions, it is not required to supply the debtor with a "laundry list" of statutory exemptions. *Id.* at 1354.

Next came *Neeley v. Century Finance Co. of Arizona*, 606 F. Supp. 1453 (D. Ariz. 1985). In that case, the creditor resorted to the garnishment of Neeley's wages to seek satisfaction of its judgment. *Id.* at 1456. Because Arizona's post-judgment garnishment notice form failed to identify any exemption, the court held that the notice was not reasonably calculated to give debtors an opportunity to present their objections and, therefore, violated federal due process. *Id.* at 1465. "At a minimum, the debtor must be provided the statutory citation, to the exemption statute as well as the alternative formulas." *Id.* at 1464. Additionally, the Arizona notice of procedures for obtaining judicial review of the

claimed exemptions was found to be deficient. *Id.* at 1466. The notice needed to inform the debtor how to state a claim of exemption by requesting a hearing with an accompanying affidavit. Finally, the matter must be heard before a court "within a meaningful time" and the court concluded that 20 days was too long. *Id.* at 1466.

Finberg, Deary, Dionne, and *Neeley* can all be distinguished from the case at hand because they involve post-judgment garnishment statutes (property of judgment debtor in possession of a third party) and not post-judgment execution statutes (property in possession of judgment debtor).

Concerning other categories of personal property a Tenth Circuit case directly relied on *Finberg* and its post-judgment garnishment progeny to resolve a post-judgment execution due process challenge. In *Aacen v. San Juan County Sheriff's Department*, 944 F.2d 691 (10th Cir. 1991), JoAnn Aacen did not defend the underlying suits and default judgments were entered. The sheriff served Aacen with a writ of execution and told her she had a few days to pay the judgment or her pickup would be seized. The pickup was seized when Aacen did not pay the judgment. Under New Mexico law, a number of exemptions were available by statute, including one vehicle valued at no more than $4,000. Aacen never asserted her exemption rights in the pickup and it was sold to satisfy the judgment against her. *Id.* at 694. In her civil rights action, Aacen claimed that New Mexico's post-judgment execution statutes were unconstitutional because they did not require notice of seizure, notice of availability of other exemptions (New Mexico only provided notice of the availability of the homestead exemption but not others), or notice of a hearing, nor did they require prompt procedures for claiming such exemptions. *Id.* at 694. The court recognized that the case presented two questions: (1) whether Aacen possessed a property right protected by due process, and (2) if so, whether a constitutional violation occurred. *Id.* at 694-95.

In addressing the first question, the court noted:

> Other circuits have uniformly treated garnishment exemptions as property interests entitled to due process protection. *Reigh v. Schleigh*, 784 F.2d 1191, 1194-95 (4th Cir. 1986); *McCahey v. L.P. Investors*, 774 F.2d 543, 548-50 (2nd Cir. 1985); *Dionne v. Bouley*, 757 F.2d 1344, 1350 (1st Cir. 1985); *Finberg v. Sullivan*, 634 F.2d 50, 56 (3rd Cir. 1980) (en banc); *Brown v. Liberty Loan Corp. of Duval*, 539 F.2d 1355, 1365, n.9 (5th Cir. 1976), *cert. denied*, 430 U.S. 949, 51 L.Ed.2d 797, 97 S.Ct. 1588 (1977). No circuit has held to the contrary. We agree with our sister circuits and hold that be creating exemptions from executions, New Mexico has granted judgment debtors a property interest in retaining their exempt property. While the state need not grant such exemptions, once given, the property rights they create are entitled to due process protection.

Aacen, 944 F.2d at 694-95. The Tenth Circuit rejected the defendant's argument that, since the property in question was in the debtor's possession at the time of execution, the court should not rely on prior cases which dealt primarily with garnishment. No difference was recognized between a garnishment case and an execution case where the judgment debtor's assets were in his own possession at the time of execution. *Id.* at 696 n.7 (citing *Clay v. Fisher*, 584 F.Supp. 730, 732, (S.D. Ohio 1984)).

In answering the second question of whether New Mexico's post-judgment proceedings were constitutionally adequate, the court applied the balancing test summarized in *Matthews*, 424 U.S. at 335, 96 S.Ct. at 903:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable

> value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Aacen, 944 F.2d at 696. In weighing the factors, the Tenth Circuit noted the creditor had a strong interest in a prompt and inexpensive satisfaction of the debt since undue delay may result in the debtor's disposition of the property or the diminution of its value. *Id.* at 696. However, the creditor's interests were adequately preserved since attachment removes the possibility that the debtor will destroy or conceal the assets. *Id.* at 696.

The Tenth Circuit then examined New Mexico statutes by applying the competing concerns of creditor and debtor to four main issues: (1) notice of seizure, (2) notice of exemptions, (3) notice of availability of a hearing, and (4) promptness of hearing.

Similar to New Mexico, Montana has granted judgment debtors a property interest in potentially exempt property under § 25-13-609. Thus, by granting these exemption rights, Dorwart is afforded the same constitutional protections for his property interests as recognized by the court in *Aacen*.

1. Notice of Seizure.

The *Aacen* court concluded that the state provided timely notice of seizure, since the writ was served several days in advance of the pending seizure. *See Id.* at 696. Thus, the Tenth Circuit did not address the constitutionality of New Mexico's statutes regarding pre-seizure notice. *Id.*

Montana's statutes do not specifically address notice of seizure. This infirmity violates state and federal due process.

2. Notice of Exemptions.

The *Aacen* court next turned to the argument that New Mexico did not provide for constitutionally sufficient notice of personal property exemptions in execution cases because it required notice only of the exemption in lieu of homestead and not any of the other statutory exemptions that were available.

Due process requires notice which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Aacen*, 994 F.2d. at 697 (quoting *Mullane*, 339 U.S. at 314, 70 S.Ct. at 657).

The exact meaning of "reasonably calculated" as it pertains to notice of exemptions in execution cases was the question presented to the court. After referring to various post-judgment garnishment cases, the *Aacen* court extracted the following rule:

> [W]e find that the Constitution requires at minimum, that the debtor be informed that various state exemptions as to real and personal property exist and, if an incomplete list is given, state that the list is partial and advise the debtor regarding discovery of unlisted exemptions.

Id. at 699. *See Reigh*, 784 F.2d at 1196 (exhaustive list of exemptions unnecessary if the notice alerts debtor that certain exemptions do exist); *McCahey*, 774 F.2d at 550-52 (general explanation of exemptions with expressly partial list of exempt properties constitutional); *Dionne*, 757 F.2d at 1354 (debtor need not be informed of all available exemptions if informed of exemptions in general); *Finberg*, 634 F.2d at 50.

In Dorwart's case, the only notice of exemptions he received was a general reference to property "NOT EXEMPT FROM EXECUTION" at the bottom of the writ of execution. In contrast, the writ of execution in *Aacen* included a direct reference to a homestead exemption but did not meet the due process

requirements as to notice of any additional exemptions. *Aacen* 944 F.2d at 698; *See also Id.* at 697 (copy of the notice). The *Aacen* court held that New Mexico's notice was inadequate because it did not qualify as a general notification of other unlisted exemptions. *Id.* at 698. Since New Mexico already required extensive notice explaining and listing garnishment exemptions, the court declared that similar provisions for execution cases would not greatly increase the administrative burden. *Id.* at 699. In contrast, Montana law does not require notice explaining and listing either garnishment or execution exemptions. Considering the balancing of interests in *Aacen*, the scales tip in favor of the judgment debtor, Dorwart The protections given to the judgment debtor would outweigh the administrative burden of including an additional paragraph in the writ of execution. *See Aacen*, 944 F.2d at 696. Dorwart did not receive sufficient notice of the available exemptions in violation of state and federal due process.

3. Notice of Availability of a Hearing.

The *Aacen* court also noted that even if Aacen had realized the availability of other state exemptions, Aacen was not provided with meaningful notice that any process existed by which to assert her exemption rights or information regarding how to pursue such claims. *Id.* at 698.

> Due process also requires some indication that a procedure exists to protect one's exempt property and how, in general, either to trigger the process or gain information regarding the process.

Id. at 699. *See McCahey*, 774 F.2d at 550 (sufficient to recommend in capital letters that debtor contact an attorney or Legal Aid in combination with notice of existence of procedures to test exemption claims). The bottom of Aacen's writ of execution stated "[i]f you wish to claim any exemptions please notify the Court of Origin." *Aacen*, 944 F.2d at 697. In analyzing the

procedure invoked by this instruction, the court discovered that a hearing would not necessarily be scheduled and Aacen's deprivation of exempt property may be unnecessarily prolonged. *Id.* at 698. Further, the court found that the debtor may be first directed to the court and then redirected to hire an attorney which may dishearten and discourage many debtors from pursuing their legitimate remedies. *Id.* at 698-99. In conclusion, the court held the notice given to Aacen was insufficient and that New Mexico's post-judgment execution statutes did require notice of the procedure to protect one's exempt property and, therefore, were unconstitutional. *See Id.* at 699.

Dorwart's writ of execution contained even less information about exemptions. The writ of execution did not provide any notice that a process existed by which to assert exemption rights. While Aacen's writ stated that the debtor should "notify the Court of Origin," Dorwart's writ contained no mention of post-deprivation procedures. Thus, using the *Aacen* analysis, the failure of Montana's exemption statutes to describe post-deprivation remedies denied Dorwart state and federal due process.

4. Prompt Hearing.

There is no provision in Montana law for any particular hearing or period of time for such hearing. In this case the Court has no information that there was a hearing although the property was released to Dorwart almost six months after application was made for its release.

The statute violates Dorwart's state and federal due process rights by not providing for prompt hearing.

5. Summary.

Here the Montana statutes are unconstitutional in that there is no provision for notice of seizure, notice of exemptions, notice of availability of hearing and a prompt hearing. The statutes violate state and federal due process. The deputies were therefore

acting in violation of Dorwart's constitutional rights in levying the writ of execution without providing the above minimal constitutional protections to Dorwart. Damage claims would be available to Dorwart against defendants unless precluded by other doctrines which will be discussed hereafter.

Having found the statute unconstitutional, Dorwart's motion for partial summary judgment should be granted concerning the action for declaratory judgment and injunction which is described in paragraph XIV of the first amended complaint and demand for jury trial.

E. *Qualified Immunity Issues as to Defendants Caraway Ames, and Brophy*

A determination that constitutional rights of Dorwart were violated as discussed in subdivision D of this memorandum does not resolve the claims under 42 U.S.C. Section 1983. As discussed in this subdivision of the memorandum, qualified immunity as a matter of law bars those claims as to the individual defendants, Caraway, Ames and Brophy. The only acts relied upon by plaintiffs are those of Caraway and Brophy.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the United States Supreme Court held that public officials are shielded from liability for civil damages when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. For the right to be clearly established "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

To determine whether a public official is entitled to qualified immunity in a Section 1983 case a court must (1) identify the

fact-specific right allegedly violated, (2) determine whether the right was clearly established, and (3) determine whether a reasonable official would have understood that what he is doing violates that right. *See Hamilton v. Endell*, 981 F.2d 1062, 1066 (9th Cir. 1992). If it is determined that the fact-specific right allegedly violated was clearly established, the burden shifts to the defendant governmental official to show that his conduct was nevertheless "reasonable" even though it might have violated the law. *Id.* Here as a matter of law the Court finds that the constitutional right was not clearly established nor could Caraway and Ames as reasonable deputy sheriffs have understood they were violating due process rights of Dorwart concerning notice referred to in subdivision D of this memorandum. Nor could Brophy have understood their acts to have violated due process rights. There are no Montana Supreme Court cases which have ruled in this area. The Montana statutes had no provisions concerning notice of exemptions, procedure to claim exemptions and hearing. The cases which this Court relies upon in determining the Montana statutes to be unconstitutional were all from other state or federal courts or other circuit courts of appeal. The case of *Aacen v. San Juan County Sheriff's Department*, 944 F.2d 691 (10th Cir 1991) was from the Tenth Circuit and not the 9th Circuit which considers Montana federal appeals. Under these circumstances Caraway, Ames and Brophy could hardly be held to a standard of anticipating the due process claims that have been made here by Dorwart.

In *Aacen* the Tenth Circuit Court of Appeals affirmed the federal district court finding that the deputy sheriffs in that case were entitled to qualified immunity. That finding was made after non-jury trial. In affirming the trial court decision the court stated at 944 F.2d 701:

> Furthermore, while it may be clear that due process requires notice of exemptions and a hearing upon seizure of a judgment debtor's property, the test of "clearly established

> law" is not to be applied at this level of generality. Rather the law must be "clearly established" in a more particularized, relevant sense. [citing case] We cannot say that the few cases cited by Aacen are sufficiently specific to clearly establish to the reasonable official that notice of a single exemption and provision of an exemption claim form to the judgment debtor do not comport with the notice requirements of the Constitution. And finally, the defendants acted in accordance with New Mexico law. As the parties do not cite to and our research has uncovered no other case in New Mexico or this circuit ruling upon the constitutionality of the statute, the sheriff's compliance with the law as it existed at the time was objectively reasonable. [citing cases] Thus, since the law regarding the sufficiency of notice and hearing for execution exemptions was unclear, we find that the defendants are entitled to qualified immunity.

Here Caraway, Ames and Brophy are protected by the doctrine of qualified immunity as to individual acts. It is apparently not claimed that Sheriff Brophy himself did any of the acts that are relied upon by plaintiffs but is joined as a party by reason of his official capacity as sheriff. If he did any of the acts he is protected individually by the doctrine of qualified immunity.

F. *Section 1983 and tort claims - Stillwater County*

There is an apparent split of authority concerning whether a local government entity may be liable for an officer's conduct even though the officer is protected by the defense of qualified immunity. The Ninth Circuit has reasoned that since local governments cannot themselves raise the qualified immunity defense the successful assertion of that defense by an employee does not necessarily prevent imposition of liability against the government. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990). The First Circuit has held that

liability against a local government entity was precluded where its employees could successfully assert a qualified immunity defense. *See Burns v. Loranger*, 907 F.2d 233, 239 (1st Cir. 1990) and *Frazier v. Bailey*, 957 F.2d 920, 931 (1st Cir. 1992).

In any event as recognized by the Montana Supreme Court in *Buhr v. Flathead County*, 268 Mont. 223, 239, 886 P.2d 381 (1994):

> Liability cannot be imposed on a local government entity for a constitutional tort pursuant to 42 U.S.C. § 1983 unless a plaintiff establishes:
>
> (1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy "amounts to deliberate indifference" to the plaintiff's constitutional right; and (4) that the policy is the "moving force behind the constitutional violation."

Here the policy manual and rules and regulations of the Stillwater County Sheriff's Office were furnished in discovery. In those documents there is no policy of any kind dealing with the issue of notice of exemptions and the method to claim exemptions upon execution. Plaintiffs have not come forward and demonstrated any such policy either oral or otherwise other than that Stillwater County was relying upon the statutes of the state of Montana. There is no genuine issue of material fact concerning elements two and three referred to in *Buhr*. The Section 1983 claims against Stillwater County and by implication against Sheriff Brophy in his capacity as Sheriff fail as a matter of law.

Plaintiffs have not demonstrated any Montana statute creating a tort claim based on alleged violations of state constitutional rights similar to Section 1983 dealing with federal constitutional rights. The court knows of no such statute. Standing alone the allegation of a violation of state due process cannot create a tort claim. If there were such a theory the defenses of qualified

immunity and other defenses allowed under Section 1983 claims would be available.

The tort claims against Stillwater County and Sheriff Brophy in his capacity as sheriff fail as a matter of law.

G. *Attorneys Fees*

The only statute applicable to this case which creates a right to attorneys fees is Section 1983. Since plaintiffs' claims under that statute fail plaintiffs are not entitled to attorneys fees as the prevailing parties on their injunction claim and their declaratory judgment action concerning the constitutionality of Montana exemption statutes.

V. ORDER

Accordingly,

IT IS ORDERED:

1. Defendants' motion for summary judgment is GRANTED as to all claims of plaintiffs in the first amended complaint except the plaintiffs' claim for declaratory judgment and injunction; in this respect defendants' motion for summary judgment is GRANTED as to the first cause of action - violation of the right of privacy, second cause of action - illegal search and seizure, third cause of action - violation of right of due process, fourth cause of action - trespass, fifth cause of action - conversion, sixth cause of action - negligent supervision, seventh cause of action - trespass against owner, eighth cause of action - unreasonable search and seizure, and plaintiffs' claims for attorneys fees; and

2. Plaintiffs' motion for partial summary judgment concerning the ninth cause of is GRANTED in the following respects - the Court has determined that there is a violation of state and federal due process in that the Montana execution, statutes do not provide for a notice of seizure, notice of exemptions, notice of availability of hearing and a prompt hearing and therefore in

those respects are unconstitutional in not making provision for such matters and Stillwater County should be permanently enjoined from levying writs of execution against plaintiff Russell Edward Dorwart without appropriate notification of exemptions and procedures to claim the same.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 3 of August, 1995.

/s/ Maurice R. Colberg, Jr.
MAURICE R. COLBERG, JR.,
DISTRICT JUDGE

cc: Gary R. Thomas
Steven J. Lehman

CERTIFICATE OF SERVICE

This is to certify that the foregoing was duly served by mail upon the parties or their attorneys of record at their last known address this 3 day of August, 1995.

/s/ Barbara Blair
Secretary to HON. MAURICE R.
COLBERG, JR.

APPENDIX C

IN THE SUPREME COURT OF
THE STATE OF MONTANA

No. 95-446

RUSSELL EDWARD DORWART and
HARRY DORWART,
Plaintiffs, Appellants and Cross-Respondents,

v.

PAUL CARAWAY, individually, and as a deputy in the Stillwater County Sheriff's Office;
DANNY AMES, individually, and as a deputy in the Stillwater County Sheriff's Office;
CLIFF BROPHY, individually, and as Sheriff of Stillwater County, Montana; and
COUNTY OF STILLWATER, State of Montana,
Defendants, Respondents, and Cross-Appellants.

ORDER

FILED: November 12, 1998

On August 4, 1998, the Opinion of this Court in the above-entitled cause was filed. On August 28, 1998, Appellants and Cross-Respondents filed their Petition for Rehearing. On September 4, 1998, Respondents and Cross-Appellants filed their Objections to Petition for Rehearing. Thereafter, the Attorney General of Montana and the Montana Bankers Association, having been granted leave by this Court to respond *amicus curiae* to the Petition for Rehearing, filed their responses.

After review of this Court's Opinion issued August 4, 1998, and having considered Appellants' and Cross-Respondents' Petition for Rehearing as well as Respondents' and Cross-Appellants' Objections, and the responses of the referenced *amicus curiae*,

IT IS ORDERED:

1. ¶ 103 of this Court's August 4, 1998 Opinion (Slip Op. at pp. 49-50) is hereby withdrawn and replaced with the following:

¶103 In summary, we conclude that, as applied in this case, Montana's post-judgment execution statutes violate state and federal constitutional guarantees of due process of law because they do not provide for notice to a judgment debtor of the seizure of the debtor's property, of the availability of statutory exemptions from execution and where to locate additional information about them, and of the availability of procedures by which to claim exemptions from execution. We further conclude that, as applied in this case, the statutes are deficient from a due process standpoint because they do not provide for a prompt hearing on claimed exemptions. Moreover, the District Court's failure to specify whether it was addressing the statutes on a facial or as applied basis notwithstanding, we deem the court's conclusion to have been on an as applied basis and hold that the District Court did not err in determining that Montana's post-judgment execution statutes are unconstitutional as applied because they do not provide the procedural due process of law required by Article II, Section 17 of the Montana Constitution and the Fourteenth Amendment to the United States Constitution.

2. In all other respects, Appellants' and Cross-Respondents' Petition for Rehearing is DENIED. Let Remittitur issue forthwith.

3. The Clerk is directed to mail true copies of this Order to counsel of record, to the State Reporter Publishing Company, to West Group and to all Montana District Court Judges.

DATED this 12th day of November, 1998.

/s/ J.A. Turnage
Chief Justice

/s/ Karla M. Gray
/s/ W. William Leaphart
/s/ William E. Hunt, Sr.
/s/ James M. Regnier
Justices

Justice James C. Nelson and Justice Terry N. Trieweiler would deny the petition for rehearing outright.

APPENDIX D

THE CONSTITUTION OF THE UNITED STATES

Amendment 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment 14

(Ratified July 9, 1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which

the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX E

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees; expert fees

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition

of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX F

MONTANA CODE ANNOTATED 1997

EXECUTION OF JUDGMENT

CHAPTER 13

EXECUTION OF JUDGMENT

Part 1—Right to Enforcement of Judgment

25-13-101. Time limit for issuing execution.
25-13-102. Execution after six years.
25-13-103. Execution after death of a party.
25-13-104. Compelling contribution or repayment—joint debtor, surety.
25-13-105. Compelling repayment—surety on appeal.

Part 2—Method of Enforcement

25-13-201. Judgments for money or the possession of property.
25-13-202. Judgments requiring the side of property.
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Part 1

Right to Enforcement of Judgment

25-13-101. Time limit for issuing execution. (1) Except as provided in subsection (2), the party in whose favor the judgment is given may, at any time within 6 years after the entry of the judgment, have a writ of execution issued for its enforcement.

(2) When the judgment is for the payment of child support, the party in whose favor the judgment is given may, at any time within 10 years after the termination of the support obligation or within 10 years from entry of a lump-sum judgment or order for support arrears, whichever is later, have a writ of execution issued for its enforcement.

25-13-102. Execution after six years. In all cases, the judgment may be enforced or carried into execution after the lapse of 6 years from the date of its entry by leave of the court,

upon motion, or by judgment for that purpose founded upon supplemental pleadings.

25-13-103. Execution after death of a party. Notwithstanding the death of a party after the judgment, execution thereon may be issued or it may be enforced as follows:

(1) In case of the death of the judgment creditor, it may be enforced upon the application of his executor or administrator or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property or the enforcement of a lien thereon, execution may be issued with the same effect as if he were still living.

25-13-104. Compelling contribution or repayment—joint debtor, surety. (1) When property liable to an execution against several persons is sold thereon and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of property of one of them or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several and is upon an obligation of one of them as surety for another and the surety pays the amount or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal.

(2) In such case, the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment if, within 10 days after his payment, he file with the clerk of the court where judgment was rendered notice of his payment and claim to contribution or repayment. Upon the filing of such notice, the clerk must make an entry thereof in the margin of the docket.

25-13-105. Compelling repayment—surety on appeal. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment,

either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same.

Part 2

Method of Enforcement

25-13-201. Judgments for money or the possession of property. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor after the return of an execution against his property unsatisfied in whole or in part.

25-13-202. Judgments requiring the sale of property. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith.

25-13-203. Judgments requiring the performance of specific acts (1) When the judgment requires the performance of any other act than those designated in 25-13-201 and 25-13-202, a certified copy of the judgment may be served upon the party against whom the same is rendered or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

(2) Where a judgment directs a party to make a deposit or delivery or to convey real property, if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may by order require the sheriff or levying officer, who may be a registered process server, to take and deposit or deliver the

money or other personal property or to convey the real property in conformity with the direction of the court.

25-13-204. Enforcement of order to pay money. Whenever an order for the payment of a sum of money is made by a court or judge pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

25-13-205. Judgments against county or county officer. When a judgment is rendered against the county or against any county officer in an action prosecuted against him in his name of office, when the same is to be paid by the county, no execution must issue upon the judgment, but the same must be paid as other county charges. When so collected, the same must be paid by the county treasurer to the proper person to whom the same is adjudged, upon the delivery of a proper voucher therefor.

Part 3

Contents of Writ

25-13-301. Form and contents of writ. (1) The writ of execution must:

(a) be issued in the name of the state of Montana, sealed with the seal of the court, and subscribed by the clerk;

(b) be directed to the sheriff or levying officer;

(c) intelligibly refer to the judgment, stating the court and the county where it was entered and, if it is for money, the amount thereof and the amount actually due thereon; and

(d) require the sheriff or levying officer to act substantially as provided in this part.

(2) In executions, the amount thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent.

25-13-302. Execution against principal debtor before surety. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff or levying officer to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors or, if sufficient thereof cannot be found within his county to satisfy the same, to levy and make the same out of the property, personal or real, of the judgment debtor who was surety.

25-13-303. Execution when only some of defendants served. When a writ of execution is issued on a judgment recovered against two or more persons in an action upon a joint contract, in which action all the defendants were not served with summons or did not appear, it must direct the sheriff or levying officer to satisfy the judgment out of the joint property of all the defendants and the individual property only of the defendants who were served or who appeared in the action.

25-13-304. Execution against property of judgment debtor. If the writ be against the property of the judgment debtor, it shall require the sheriff or levying officer to satisfy the judgment, with interest, out of the personal property of such debtor and, if sufficient personal property cannot be found, out of his real property as provided in 25-13-305.

25-13-305. Execution of lien on real property. If the judgment be a lien upon real property, the writ shall require the sheriff or levying officer to satisfy the judgment, with interest, out of the real property belonging to the judgment debtor on the day when the judgment was docketed or at any time thereafter or, if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of

the docket was filed in the office of the clerk of the district court of such county, stating such day, or any time thereafter.

25-13-306. Execution against property in hands of representative. If the writ be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff or levying officer to satisfy the judgment, with interest, out of such property.

25-13-307. Execution requiring delivery of possession of property. If the writ be for the delivery of the possession of real or personal property, it must require the sheriff or levying officer to deliver the possession of the same, particularly describing it, to the party entitled thereto and may at any time require the sheriff or levying officer to satisfy any costs, damages, rents, or profits recovered by the same judgment out of the personal property of the person against whom it was rendered, the value of the property for which the judgment was rendered to be specified therein, if a delivery cannot be had, and if sufficient personal property cannot be found, then out of the real property, as provided in 25-13-305.

25-13-308. Execution against person of judgment debtor. If the writ be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged, according to law.

Part 4

Execution and Return of Writ

25-13-401. To whom execution issued. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff or levying officer of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff or levying officer of the county where the

property or some part thereof is situated. Executions may be issued at the same time to different counties.

25-13-402. How writ executed. The sheriff or levying officer must execute the writ against the property of the judgment debtor no later than 60 days after receipt of the writ by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff or levying officer, he must levy only on such part of the property as the judgment debtor may indicate if the property indicated be amply sufficient to satisfy the judgment and costs.

25-13-403. Security for costs when property seized. If the sheriff or levying officer will incur substantial costs in transporting, keeping, or storing the property seized, the party requesting service of a writ of execution shall provide a bond or other security to pay for all costs which may be incurred as a result of the service of such writ.

25-13-404. Return of the execution. (1) Except as provided in subsections (2) and (3), execution may be made returnable to the clerk of the court in which the judgment was rendered, at any time not less than 10 or more than 60 days after receipt of the recovery by the sheriff or levying officer following imposition of levy, as provided in 25-13-402.

(2) The writ of execution issued by the county treasurer under 15-16-401 may be made returnable, at any time not less than 10 or more than 90 days after its receipt by the sheriff or levying officer, to the county treasurer of the county in which the writ was issued.

(3) In compliance with the provisions of subsection (1) and in lieu of returning the writ of execution to the clerk of the court, the sheriff may enclose his return of the writ in an envelope to the officer, agent, or attorney who sent it and deposit it m the post office, prepaying the postage.

25-13-405. Clerk to record returned execution when levy on real property. If any real estate be levied upon, the clerk must record the execution and the return thereto at large and certify the same under his hand as true copies in a book to be called the "execution book", which must be indexed, with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated.

25-13-406 through 25-13-410 reserved.

25-13-411. Repealed. Sec. 3, Ch. 301, L. 1989.

Part 5

Property Subject to Execution

25-13-501. What property subject to execution. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action are liable to execution. Shares and interest in any corporation or company, debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

25-13-502. Debts owed to judgment debtor. After the issuing of an execution against property and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is sufficient discharge for the amount so paid.

25-13-503. Property claimed by third persons. If personal property levied upon be claimed by a third person, the same proceedings shall be had as provided in attachment in 27-18-602.

25-13-504. Garnishment of public officers. The provisions of 27-18-406, relating to the garnishment of public officers, apply to the levy of an execution.

25-13-505. Personal property subject to a security interest. Personal property subject to a security interest may be taken on execution issued at the suit of a creditor of the debtor under the security agreement; but before the property is so taken, the officer levying the writ must pay or tender to the secured party the amount of the security agreement debt and interest or must deposit the same with the county treasurer of the county in which the financing statement covering the security agreement is filed, if such statement is filed with a county clerk and recorder, or if such statement is filed with another filing officer pursuant to law, then with such other filing officer, payable to the order of the secured party.

25-13-506. Duty of secured party. (1) The secured party under any security agreement of record shall, upon 15 days' notice in writing served upon him in person by any creditor of the debtor seeking to satisfy a judgment of such creditor against the debtor, be required to make and file in the office of the county clerk and recorder or other filing officer with whom the financing statement covering the security agreement is filed an affidavit showing the amount of the indebtedness then actually due and owing to the secured party; and such affidavit shall state the

amount of the original obligation for which the security agreement was given as security, all additional advancement of money or property on the principal obligation since the date of the execution of the security agreement, all payments of whatsoever kind, whether on principal or interest, made by the debtor to the date of the execution of such affidavit by the secured party, and the balance then remaining due and unpaid to the secured party. If within 15 days from the service of any such demand in writing on the secured party by any creditor of the debtor, the secured party shall fail, refuse, or neglect to file the affidavit herein required, the security agreement shall be of no force or effect as against such creditor upon the seizure of any such personal property on execution.

(2) In the event the amount shown to be due is paid to the county treasurer or to a filing officer, as aforesaid, or to the secured party in satisfaction of the security agreement by any execution creditor against the debtor, the secured party shall be required to surrender to the county treasurer or such filing officer the security agreement and any note or other evidence of indebtedness secured thereby, which security agreement or other evidence of indebtedness shall be delivered by the secured party, county treasurer, or filing officer to the execution creditor.

Part 6

Property Exempt From Execution

25-13-601. Waiver of exemptions in unsecured note unenforceable. Any waiver of statutory exemption from execution in an unsecured promissory note shall be unenforceable.

25-13-602. Repealed. Sec. 6, Ch. 210, L. 1985.

25-13-603 through 25-13-605 reserved.

25-13-606. Protection of property of residents. A resident of this state is entitled to the exemptions provided in this part.

25-13-607. Claim enforceable against exempt property. Notwithstanding any other provision of this part, a creditor may levy against exempt property to enforce a claim for:

(1) the purchase price of the property; or

(2) a loan made for the express purpose of enabling the judgment debtor to purchase the property and used for that purpose.

25-13-608. Property exempt without limitation—exceptions. (1) A judgment debtor is entitled to exemption from execution of the following:

(a) professionally prescribed health aids for the judgment debtor or a dependent of the judgment debtor;

(b) benefits the judgment debtor has received or is entitled to receive under federal social security or local public assistance legislation, except as provided in subsection (2);

(c) veterans' benefits, except as provided in subsection (2);

(d) disability or illness benefits, except as provided in subsection (2);

(e) benefits paid or payable for medical, surgical, or hospital care to the extent they are used or will be used to pay for the care;

(f) maintenance and child support; and

(g) a burial plot for the judgment debtor and the debtor's family.

(2) Veterans' and social security legislation benefits based upon remuneration for employment, as defined in 42 U.S.C. 662(f), and disability benefits are not exempt from execution if the debt for which execution is levied is for:

(a) child support; or

(b) maintenance to be paid to a spouse or former spouse if the spouse or former spouse is the custodial parent of a child for whom child support is owed or owing and the judgment debtor is the parent of the child.

25-13-609. Personal property exempt subject to value limitations. A judgment debtor is entitled to exemption from execution of the following:

(1) the judgment debtor's interest, not to exceed $4,500 in aggregate value, to the extent of a value not exceeding $600 in any item of property, in household furnishings and goods, appliances, jewelry, wearing apparel, books, firearms and other sporting goods, animals, feed, crops, and musical instruments;

(2) the judgment debtor's interest, not to exceed $1,200 in value, in one motor vehicle;

(3) the judgment debtor's interest, not to exceed $3,000 in aggregate value, in any implements, professional books, and tools, of the trade of the judgment debtor or a dependent of the judgment debtor; and

(4) the judgment debtor's interest, not to exceed $4,000 in value, in any unmatured life insurance contracts owned by him.

25-13-610. Tracing exempt personal property. (1) If money or other property exempt under 25-13-608 and 25-13-609 has been sold or has been lost, damaged, or destroyed and the judgment debtor has been indemnified for it, he is entitled for 6 months to an exemption of proceeds that are traceable (for example, in a bank or savings account).

(2) Earnings exempt under 25-13-614 remain exempt for 45 days after receipt by and while in the possession of the judgment debtor in a form into which the exempt earnings are traceable (for example, in a bank or savings account).

(3) Proceeds are traceable under this section by application of the principles of first-in first-out, last-in first-out, or any other reasonable basis for tracing selected by the judgment debtor.

25-13-611. Repealed. Sec. 11, Ch. 302, L. 1987.

25-13-612. Repealed. Sec. 11, Ch. 302, L. 1987.

25-13-613. Property necessary to carry out governmental functions. (1) In addition to the property mentioned in 25-13-609(1), there shall be exempt to all judgment debtors the following property:

(a) all fire engines, hooks, and ladders, with the cart, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this state;

(b) all arms, uniforms, and accouterments required by law to be kept by any person and one gun to be selected by the debtor;

(c) all courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state; and

(d) all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining owned or held by any town or incorporated city or dedicated by such city or town to health, ornament, or public use or for the use of any fire or military company organized under the laws of the state.

(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a

mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

25-13-614. Earnings of judgment debtor. (1) Earnings of a judgment debtor that are not subject to garnishment as provided in this section are exempt.

(2) Except as provided in subsections (3) and (4), the maximum part of the aggregate disposable earnings of a judgment debtor for any workweek that is subjected to garnishment may not exceed the lesser of:

(a) the amount by which his disposable earnings for the week exceed 30 times the federal minimum hourly wage in effect at the time the earnings are payable; or

(b) 25% of his disposable earnings for that week.

(3) The restrictions of subsection (2) do not apply in the case of an order or judgment for the maintenance or support of any person, issued by a court of competent jurisdiction or pursuant to an administrative procedure that is established by state law, affords substantial due process, and is subject to judicial review.

(4) (a) The maximum part of the aggregate disposable earnings of a judgment debtor for any workweek that is subject to garnishment to enforce an order described in subsection (3) may not exceed:

(i) 50% of the judgment debtor's disposable earnings for that week if he is supporting his spouse or dependent child (other than a spouse or child for whom the order is issued); or

(ii) 60% of the judgment debtor's disposable earnings for that week if he is not supporting a spouse or dependent child described in subsection (4)(a)(i).

(b) However, the amount stated in subsection (4)(a)(i) may be 55% and the amount stated in subsection (4)(a)(ii) may be

65% if such earnings are being garnished to enforce an order for maintenance or support for a period prior to the 12-week period that ends with the beginning of such workweek.

(5) For the purposes of this section, the definitions of earnings, disposable earnings, and garnishment are as set forth in 15 U.S.C. 1672.

25-13-615. Homestead. The homestead of a judgment debtor exempt from execution is provided for in Title 70, chapter 32.

25-13-616. Repealed. Sec. 11, Ch. 302, L. 1987.

25-13-617. Repealed. Sec. 11, Ch. 302, L. 1987.

Part 7

Sale on Execution

25-13-701. Notice of sale on execution. (1) Before the sale of the property on execution, notice thereof must be given as follows:

(a) in case of perishable property, by posting written notice of the time and place of the sale in three public places in the county where the sale is to take place, for such time as may be reasonable considering the character and condition of the property;

(b) in case of other personal property, by posting a similar notice in three public places in the county where the sale is to take place, for not less than 5 days or more than 10 days, and by publishing a copy of the notice at least 1 week before the sale in a newspaper of general circulation published in the county, if there be one;

(c) in case of real property, by posting a similar notice, particularly describing the property, for 20 days in three public places in the county where the property is situated and also where the property is to be sold, which may be either at the courthouse

or on the premises, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one, which notice shall be substantially as follows:

SHERIFF'S SALE

....., Plaintiff,

vs.

....., Defendant,

To be sold at sheriff's sale on the .... day of ...., 19.., at ..... (Here insert brief description of property.)

Signed ....., Sheriff

(2) Any sheriff publishing a notice not in accordance with the form set forth in subsection (1)(c) and which shall cost more than such a notice shall not be entitled to any costs for publication of the same but shall be personally liable for the payment of such publication;

25-13-702. Penalty for selling without notice or destruction of notice. An officer selling without the notice prescribed by 25-13-701 forfeits $500 to the aggrieved party in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or satisfaction of the judgment (if the judgment be satisfied before sale), forfeits $500.

25-13-703. Postponement of sale. Good cause therefor appearing, the officer holding the execution may postpone any sale noticed thereunder for a period not exceeding 15 days, by public proclamation at the time and place fixed in the notice of sale and by posting a notice in three public places in the township where the property has previously been noticed to be sold.

25-13-704. Conduct of sale. (1) All sales of property under execution must be made at auction to the highest bidder, between

the hours of 9 a.m. and 5 p.m. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale.

(2) When the sale is of personal property capable of manual delivery, it must be within view of those who attend the sale and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property consisting of several known lots or parcels, they must be sold separately, or when a portion of such real property is claimed by a third person and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold when such property consists of several known lots or parcels or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

25-13-705. Procedure when purchaser refuses to pay. If a purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction, and the person refusing to pay the costs which have accrued by reason of his bid shall be deemed guilty of contempt of court and punished accordingly.

25-13-706. Rejection of subsequent bids after refusal to pay. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such purchaser.

25-13-707. Liability of officer after resale. Sections 25-13-705 and 25-13-706 must not be construed to make the officer liable for any more than the amount bid by the second or

subsequent purchaser and the amount collected from the purchaser refusing to pay.

25-13-708. Conveyance of personal property capable of manual delivery. When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale must deliver to the purchaser the property and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

25-13-709. Conveyance of personal property not capable of manual delivery. When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

25-13-710. Real property—what interest transferred. Upon a sale of real property, the purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of 2 years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in part 8 of this chapter.

25-13-711. Real property—certificate of sale. (1) Upon a sale of real property, the officer must give to the purchaser a certificate of sale, containing:

(a) a particular description of the property sold;

(b) the price bid for each distinct lot or parcel;

(c) the whole price paid;

(d) when subject to redemption, a statement to that effect.

(2) A duplicate of such certificate must be filed by the officer in the office of the county clerk.

25-13-712. Property subject to a security interest—disposition of proceeds, security agreement. (1) When the property taken under 25-13-505 is sold under process, the officer levying the writ must apply the proceeds of the sale as follows:

(a) to the repayment of the sum paid to the secured party, with interest from the date of such payment; and

(b) the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

(2) In the event the property is sold under execution, such creditor shall be required to deliver to the debtor the security agreement and any note or other evidence of indebtedness secured thereby obtained from the secured party when the property is sold for the amount of the indebtedness under the security agreement or an amount in excess thereof.

25-13-713. Procedure when sale invalidated, revival of judgment. (1) If the purchaser of real property sold on execution or his successor in interest be evicted therefrom in consequence of irregularities in the proceedings concerning the sale or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor.

(2) If the purchaser of property at sheriffs sale or his successor in interest fail to recover possession in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon

from the time of payment at the same rate that the original judgment bore. When so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, bearing interest as aforesaid; and any other or after-acquired property, rents, issues, or profits of the said debtor shall be liable to levy and sale under execution in satisfaction of such debt, but no property of such debtor sold bona fide before the filing of such petition shall be subject to the lien of said judgment. The notice of the filing of such petition shall be made by filing a notice thereof in the office of the county clerk where such property may be situated, and said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest.

25-13-714. Validation of defective judicial sales. All judicial sales of real property prior to January 1, 1973, provided no action is pending on July 1,1973, to set such sale aside, where made in this state on proceedings to satisfy valid judgments or decrees of any court and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such sale and, when no such deed has been executed, shall entitle such purchaser to such deed; and such deed, if now or when executed, shall be sufficient to convey all the title of the judgment debtor at the time of such sale in the premises so sold to the purchaser at said sale, and all defects or irregularities in the issuance of execution, the manner of making or conducting the sale, or the recitals or references in such deed shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

CHAPTER 14

PROCEEDINGS IN AID OF EXECUTION

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Part 1

Proceedings to Determine Availability of Property

25-14-101. Debtor to answer concerning his property when execution unsatisfied. When an execution against property of the judgment debtor or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or, if he does not reside in this state, to the sheriff of the county where the judgment is docketed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court requiring such judgment debtor to appear and answer concerning his property before such judge or a referee appointed by him at a time and place specified in the order; but no judgment debtor who is a resident may be required to attend before a judge or referee out of the county in which he resides.

25-14-102. Procedure when debtor withholding property from execution, arrest. (1) After the issuing of an execution against property and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge or a referee appointed by him to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution.

(2) Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor or his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking with sufficient surety that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.

25-14-103. Debtors of judgment debtor and those holding his property to answer. After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment, or upon proof, by affidavit or otherwise, to the satisfaction of the judge that any person or corporation has property of such judgment debtor or is indebted to him in an amount exceeding $50, the judge may, by an order, require such person or corporation or any officer or member thereof to appear at a specified time and place before him or a referee appointed by him and answer concerning the same.

25-14-104. Procedure when debt to or ownership of judgment debtor denied. If it appear that a person or corporation alleged to have property of the judgment debtor or to be indebted to him claims an interest in the property adverse to him or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment. Such

order may be modified or vacated by the judge granting the same or the court in which the action is brought, at any time, upon such terms as may be just.

25-14-105. Requiring witnesses to testify. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under parts 1 and 2 of this chapter, in the same manner as upon the trial of an issue.

25-14-106. Immunity of witnesses to criminal proceedings. A party or witness examined in proceedings authorized by parts 1 and 2 of this chapter is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud or to prove that he has been a party or privy to or knowing of a conveyance, assignment, transfer, or other disposition of property for any purpose or that he or any other person claims to be entitled, as against the judgment creditor or a receiver appointed or to be appointed in the proceedings, to hold property derived from or through the judgment debtor or to be discharged from the payment of a debt which was due to the judgment debtor or to a person in his behalf But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding.

25-14-107. Order to apply property to satisfaction of judgment. The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

25-14-108. Contempt to disobey referee's orders. If any person, party, or witness disobey an order of the referee, properly made in the proceedings before him under parts 1 and 2 of this chapter, he may be punished by the court or judge ordering the reference for a contempt.

APPENDIX G

MONTANA CODES ANNOTATED 1989

CHAPTER 13

EXECUTION OF JUDGMENT

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Part 1

Right to Enforcement of Judgment

25-13-101. Time limit for issuing execution. The party in whose favor judgment is given may, at any time within 6 years after the entry thereof, have a writ of execution issued for its enforcement.

25-13-102. Execution after six years. In all cases, the judgment may be enforced or carried into execution after the lapse of 6 years from the date of its entry by leave of the court, upon motion, or by judgment for that purpose founded upon supplemental pleadings.

25-13-103. Execution after death of a party. Notwithstanding the death of a party after the judgment, execution thereon may be issued or it may be enforced as follows:

(1) In case of the death of the judgment creditor, it may be enforced upon the application of his executor or administrator or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property or the enforcement of a lien thereon, execution may be issued with the same effect as if he were still living.

25-13-104. Compelling contribution or repayment—joint debtor, surety. (1) When property liable to an execution against several persons is sold thereon and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of property of one of them or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several and is upon an obligation of one of them as surety for another and the surety pays the amount or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal.

(2) In such case, the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment if, within 10 days after his payment, he file with the clerk of the court where judgment was rendered notice of his payment and claim to contribution or repayment. Upon the filing of such notice, the clerk must make an entry thereof in the margin of the docket.

25-13-105. Compelling repayment—surety on appeal. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor and

is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same.

Part 2

Method of Enforcement

25-13-201. Judgments for money or the possession of property. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor after the return of an execution against his property unsatisfied in whole or in part.

25-13-202. Judgments requiring the sale of property. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith.

25-13-203. Judgments requiring the performance of specific acts (1) When the judgment requires the performance of any other act than those designated in 25-13-201 and 25-13-202, a certified copy of the judgment may be served upon the party against whom the same is rendered or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

(2) Where a judgment directs a party to make a deposit or delivery or to convey real property, if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may by order require the sheriff or levying officer, who may be a registered process server, to take and deposit or deliver the money or other personal property or to convey the real property in conformity with the direction of the court.

25-13-204. Enforcement of order to pay money. Whenever an order for the payment of a sum of money is made by a court or judge pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

25-13-205. Judgments against county or county officer. When a judgment is rendered against the county or against any county officer in an action prosecuted against him in his name of office, when the same is to be paid by the county, no execution must issue upon the judgment, but the same must be paid as other county charges. When so collected, the same must be paid by the county treasurer to the proper person to whom the same is adjudged, upon the delivery of a proper voucher therefor.

Part 3

Contents of Writ

25-13-301. Form and contents of writ. (1) The writ of execution must:

(a) be issued in the name of the state of Montana, sealed with the seal of the court, and subscribed by the clerk;

(b) be directed to the sheriff or levying officer;

(c) intelligibly refer to the judgment, stating the court and the county where it was entered and, if it is for money, the amount thereof and the amount actually due thereon; and

(d) require the sheriff or levying officer to act substantially as provided in this part.

(2) In executions, the amount thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent.

25-13-302. Execution against principal debtor before surety. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff or levying officer to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors or, if sufficient thereof cannot be found within his county to satisfy the same, to levy and make the same out of the property, personal or real, of the judgment debtor who was surety.

25-13-303. Execution when only some of defendants served. When a writ of execution is issued on a judgment recovered against two or more persons in an action upon a joint contract, in which action all the defendants were not served with summons or did not appear, it must direct the sheriff or levying officer to satisfy the judgment out of the joint property of all the defendants and the individual property only of the defendants who were served or who appeared in the action.

25-13-304. Execution against property of judgment debtor. If the writ be against the property of the judgment debtor, it shall require the sheriff or levying officer to satisfy the judgment, with interest, out of the personal property of such debtor and, if sufficient personal property cannot be found, out of his real property as provided in 25-13-305.

25-13-305. Execution of lien on real property. If the judgment be a lien upon real property, the writ shall require the sheriff or levying officer to satisfy the judgment, with interest, out of the real property belonging to the judgment debtor on the day when the judgment was docketed or at any time thereafter or, if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of

the docket was filed in the office of the clerk of the district court of such county, stating such day, or any time thereafter.

25-13-306. Execution against property in hands of representative. If the writ be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff or levying officer to satisfy the judgment, with interest, out of such property.

25-13-307. Execution requiring delivery of possession of property. If the writ be for the delivery of the possession of real or personal property, it must require the sheriff or levying officer to deliver the possession of the same, particularly describing it, to the party entitled thereto and may at any time require the sheriff or levying officer to satisfy any costs, damages, rents, or profits recovered by the same judgment out of the personal property of the person against whom it was rendered, the value of the property for which the judgment was rendered to be specified therein, if a delivery cannot be had, and if sufficient personal property cannot be found, then out of the real property, as provided in 25-13-305.

25-13-308. Execution against person of judgment debtor. If the writ be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged, according to law.

Part 4

Execution and Return of Writ

25-13-401. To whom execution issued. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff or levying officer of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff or levying officer of the county where the

property or some part thereof is situated. Executions may be issued at the same time to different counties.

25-13-402. How writ executed. The sheriff or levying officer must execute the writ against the property of the judgment debtor no later than 60 days after receipt of the writ by levying on a sufficient amount of property, if there be sufficient, collecting or selling the things in action, and selling the other property and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment. Any excess in the proceeds over the judgment and accruing costs must be returned to the judgment debtor unless otherwise directed by the judgment or order of the court. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and accruing costs within the view of the sheriff or levying officer, he must levy only on such part of the property as the judgment debtor may indicate if the property indicated be amply sufficient to satisfy the judgment and costs.

25-13-403. Security for costs when property seized. If the sheriff or levying officer will incur substantial costs in transporting, keeping, or storing the property seized, the party requesting service of a writ of execution shall provide a bond or other security to pay for all costs which may be incurred as a result of the service of such writ.

25-13-404. Return of the execution. (1) Except as provided in subsections (2) and (3), execution may be made returnable to the clerk of the court in which the judgment was rendered, at any time not less than 10 or more than 60 days after receipt of the recovery by the sheriff or levying officer following imposition of levy, as provided in 25-13-402.

(2) The writ of execution issued by the county treasurer under 15-16-401 may be made returnable, at any time not less than 10 or more than 90 days after its receipt by the sheriff or levying officer, to the county treasurer of the county in which the writ was issued.

(3) In compliance with the provisions of subsection (1) and in lieu of returning the writ of execution to the clerk of the court, the sheriff may enclose his return of the writ in an envelope to the officer, agent, or attorney who sent it and deposit it in the post office, prepaying the postage.

25-13-405. Clerk to record returned execution when levy on real property. If any real estate be levied upon, the clerk must record the execution and the return thereto at large and certify the same under his hand as true copies in a book to be called the "execution book", which must be indexed, with the names of the plaintiffs and defendants in execution alphabetically arranged, and kept open at all times during office hours for the inspection of the public, without charge. It is evidence of the contents of the originals whenever they or any part thereof may be destroyed or mutilated.

25-13-406 through 25-13-410 reserved.

25-13-411. Repealed. Sec. 3, Ch. 301, L. 1989.

Part 5

Property Subject to Execution

25-13-501. What property subject to execution. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action are liable to execution. Shares and interest in any corporation or company, debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

25-13-502. Debts owed to judgment debtor. After the issuing of an execution against property and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is sufficient discharge for the amount so paid.

25-13-503. Property claimed by third persons. If personal property levied upon be claimed by a third person, the same proceedings shall be had as provided in attachment in 27-18-602.

25-13-504. Garnishment of public officers. The provisions of 27-18-406, relating to the garnishment of public officers, apply to the levy of an execution.

25-13-505. Personal property subject to a security interest. Personal property subject to a security interest may be taken on execution issued at the suit of a creditor of the debtor under the security agreement; but before the property is so taken, the officer levying the writ must pay or tender to the secured party the amount of the security agreement debt and interest or must deposit the same with the county treasurer of the county in which the financing statement covering the security agreement is filed, if such statement is filed with a county clerk and recorder, or if such statement is filed with another filing officer pursuant to law, then with such other filing officer, payable to the order of the secured party.

25-13-506. Duty of secured party. (1) The secured party under any security agreement of record shall, upon 15 days' notice in writing served upon him in person by any creditor of the debtor seeking to satisfy a judgment of such creditor against the debtor, be required to make and file in the office of the county clerk and recorder or other filing officer with whom the financing statement covering the security agreement is filed an affidavit showing the amount of the indebtedness then actually due and owing to the secured party; and such affidavit shall state the

amount of the original obligation for which the security agreement was given as security, all additional advancement of money or property on the principal obligation since the date of the execution of the security agreement, all payments of whatsoever kind, whether on principal or interest, made by the debtor to the date of the execution of such affidavit by the secured party, and the balance then remaining due and unpaid to the secured party. If within 15 days from the service of any such demand in writing on the secured party by any creditor of the debtor, the secured party shall fail, refuse, or neglect to file the affidavit herein required, the security agreement shall be of no force or effect as against such creditor upon the seizure of any such personal property on execution.

(2) In the event the amount shown to be due is paid to the county treasurer or to a filing officer, as aforesaid, or to the secured party in satisfaction of the security agreement by any execution creditor against the debtor, the secured party shall be required to surrender to the county treasurer or such filing officer the security agreement and any note or other evidence of indebtedness secured thereby, which security agreement or other evidence of indebtedness shall be delivered by the secured party, county treasurer, or filing officer to the execution creditor.

Part 6

Property Exempt From Execution

25-13-601. Waiver of exemptions in unsecured note unenforceable. Any waiver of statutory exemption from execution in an unsecured promissory note shall be unenforceable.

25-13-602. Repealed. Sec. 6, Ch. 210, L. 1985.

25-13-603 through 25-13-605 reserved.

25-13-606. Protection of property of residents. A resident of this state is entitled to the exemptions provided in this part.

25-13-607. Claim enforceable against exempt property. Notwithstanding any other provision of this part, a creditor may levy against exempt property to enforce a claim for:

(1) the purchase price of the property; or

(2) a loan made for the express purpose of enabling the judgment debtor to purchase the property and used for that purpose.

25-13-608. Property exempt without limitation—exceptions. (1) A judgment debtor is entitled to exemption from execution of the following:

(a) professionally prescribed health aids for the judgment debtor or a dependent of the judgment debtor;

(b) benefits the judgment debtor has received or is entitled to receive under federal social security or local public assistance legislation, except as provided in subsection (2);

(c) veterans' benefits, except as provided in subsection (2);

(d) disability or illness benefits,

(e) benefits paid or payable for medical, surgical, or hospital care to the extent they are used or will be used to pay for the care;

(f) maintenance and child support; and

(g) a burial plot for the judgment debtor and the debtor's family.

(2) Veterans' and social security legislation benefits based upon remuneration for employment, as defined in 42 U.S.C. 662(f), and disability benefits are not exempt from execution if the debt for which execution is levied is for:

(a) child support; or

(b) maintenance to be paid to a spouse or former spouse if the spouse or former spouse is the custodial parent of a child for whom child support is owed or owing and the judgment debtor is the parent of the child.

25-13-609. Personal property exempt subject to value limitations. A judgment debtor is entitled to exemption from execution of the following:

(1) the judgment debtor's interest, not to exceed $4,500 in aggregate value, to the extent of a value not exceeding $600 in any item of property, in household furnishings and goods, appliances, jewelry, wearing apparel, books, firearms and other sporting goods, animals, feed, crops, and musical instruments;

(2) the judgment debtor's interest, not to exceed $1,200 in value, in one motor vehicle;

(3) the judgment debtor's interest, not to exceed $3,000 in aggregate value, in any implements, professional books, and tools, of the trade of the judgment debtor or a dependent of the judgment debtor; and

(4) the judgment debtor's interest, not to exceed $4,000 in value, in any unmatured life insurance contracts owned by him

25-13-610. Tracing exempt personal property. (1) If money or other property exempt under 25-13-608 and 25-13-609 has been sold or has been lost, damaged, or destroyed and the judgment debtor has been indemnified for it, he is entitled for 6 months to an exemption of proceeds that are traceable (for example, in a bank or savings account).

(2) Earnings exempt under 25-13-614 remain exempt for 45 days after receipt by and while in the possession of the judgment debtor in a form into which the exempt earnings are traceable (for example, in a bank or savings account).

(3) Proceeds are traceable under this section by application of the principles of first-in first-out, last-in first-out, or any other reasonable basis for tracing selected by the judgment debtor.

25-13-611. Repealed. Sec. 11, Ch. 302, L. 1987.

25-13-612. Repealed. Sec. 11, Ch. 302, L. 1987.

25-13-613. Property necessary to carry out governmental functions. (1) In addition to the property mentioned in 25-13-609(1), there shall be exempt to all judgment debtors the following property:

(a) all fire engines, hooks, and ladders, with the cart, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this state;

(b) all arms, uniforms, and accouterments required by law to be kept by any person and one gun to be selected by the debtor;

(c) all courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state; and

(d) all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining owned or held by any town or incorporated city or dedicated by such city or town to health, ornament, or public use or for the use of any fire or military company organized under the laws of the state.

(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a

mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

25-13-614. Earnings of judgment debtor. (1) Earnings of a judgment debtor that are not subject to garnishment as provided in this section are exempt.

(2) Except as provided in subsections (3) and (4), the maximum part of the aggregate disposable earnings of a judgment debtor for any workweek that is subjected to garnishment may not exceed the lesser of:

(a) the amount by which his disposable earnings for the week exceed 30 times the federal minimum hourly wage in effect at the time the earnings are payable; or

(b) 25% of his disposable earnings for that week.

(3) The restrictions of subsection (2) do not apply in the case of an order or judgment for the maintenance or support of any person, issued by a court of competent jurisdiction or pursuant to an administrative procedure that is established by state law, affords substantial due process, and is subject to judicial review.

(4) (a) The maximum part of the aggregate disposable earnings of a judgment debtor for any workweek that is subject to garnishment to enforce an order described in subsection (3) may not exceed:

(i) 50% of the judgment debtor's disposable earnings for that week if he is supporting his spouse or dependent child (other than a spouse or child for whom the order is issued); or

(ii) 60% of the judgment debtor's disposable earnings for that week if he is not supporting a spouse or dependent child described in subsection (4)(a)(i).

(b) However, the amount stated in subsection (4)(a)(i) may be 55% and the amount stated in subsection (4)(a)(ii) may be

65% if such earnings are being garnished to enforce an order for maintenance or support for a period prior to the 12-week period that ends with the beginning of such workweek.

(5) For the purposes of this section, the definitions of earnings, disposable earnings, and garnishment are as set forth in 15 U.S.C. 1672.

25-13-615. Homestead. The homestead of a judgment debtor exempt from execution is provided for in Title 70, chapter 32.

25-13-616. Repealed. Sec. 11, Ch. 302, L. 1987.

25-13-617. Repealed. Sec. 11, Ch. 302, L. 1987.

Part 7

Sale on Execution

25-13-701. Notice of sale on execution. (1) Before the sale of the property on execution, notice thereof must be given as follows:

(a) in case of perishable property, by posting written notice of the time and place of the sale in three public places in the county where the sale is to take place, for such time as may be reasonable considering the character and condition of the property;

(b) in case of other personal property, by posting a similar notice in three public places in the county where the sale is to take place, for not less than 5 days or more than 10 days, and by publishing a copy of the notice at least 1 week before the sale in a newspaper of general circulation published in the county, if there be one;

(c) in case of real property, by posting a similar notice, particularly describing the property, for 20 days in three public places in the county where the property is situated and also where the property is to be sold, which may be either at the courthouse

or on the premises, and publishing a copy thereof once a week for the same period in some newspaper published in the county, if there be one, which notice shall be substantially as follows:

SHERIFF'S SALE

....., Plaintiff,

vs.

....., Defendant,

To be sold at sheriff's sale on the .... day of ...., 19.., at .....
(Here insert brief description of property.)

Signed ....., Sheriff

(2) Any sheriff publishing a notice not in accordance with the form set forth in subsection (1)(c) and which shall cost more than such a notice shall not be entitled to any costs for publication of the same but shall be personally liable for the payment of such publication;

25-13-702. Penalty for selling without notice or destruction of notice. An officer selling without the notice prescribed by 25-13-701 forfeits $500 to the aggrieved party in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or satisfaction of the judgment (if the judgment be satisfied before sale), forfeits $500.

25-13-703. Postponement of sale. Good cause therefor appearing, the officer holding the execution may postpone any sale noticed thereunder for a period not exceeding 15 days, by public proclamation at the time and place fixed in the notice of sale and by posting a notice in three public places in the township where the property has previously been noticed to be sold.

25-13-704. Conduct of sale. (1) All sales of property under execution must be made at auction to the highest bidder, between

the hours of 9 a.m. and 5 p.m. After sufficient property has been sold to satisfy the execution, no more can be sold. Neither the officer holding the execution nor his deputy can become a purchaser or be interested in any purchase at such sale.

(2) When the sale is of personal property capable of manual delivery, it must be within view of those who attend the sale and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property consisting of several known lots or parcels, they must be sold separately, or when a portion of such real property is claimed by a third person and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold when such property consists of several known lots or parcels or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

25-13-705. Procedure when purchaser refuses to pay. If a purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction, and the person refusing to pay the costs which have accrued by reason of his bid shall be deemed guilty of contempt of court and punished accordingly.

25-13-706. Rejection of subsequent bids after refusal to pay. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such purchaser.

25-13-707. Liability of officer after resale. Sections 25-13-705 and 25-13-706 must not be construed to make the officer liable for any more than the amount bid by the second or

subsequent purchaser and the amount collected from the purchaser refusing to pay.

25-13-708. Conveyance of personal property capable of manual delivery. When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale must deliver to the purchaser the property and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

25-13-709. Conveyance of personal property not capable of manual delivery. When the purchaser of any personal property not capable of manual delivery pays the purchase money, the officer making the sale must execute and deliver to the purchaser a certificate of sale. Such certificate conveys to the purchaser all the right which the debtor had in such property on the day the execution or attachment was levied.

25-13-710. Real property—what interest transferred. Upon a sale of real property, the purchaser is substituted to and acquires the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of 2 years' unexpired term, the sale is absolute. In all other cases, the property is subject to redemption, as provided in part 8 of this chapter.

25-13-711. Real property—certificate of sale. (1) Upon a sale of real property, the officer must give to the purchaser a certificate of sale, containing:

(a) a particular description of the property sold;

(b) the price bid for each distinct lot or parcel;

(c) the whole price paid;

(d) when subject to redemption, a statement to that effect.

(2) A duplicate of such certificate must be filed by the officer in the office of the county clerk.

25-13-712. Property subject to a security interest—disposition of proceeds, security agreement. (1) When the property taken under 25-13-505 is sold under process, the officer levying the writ must apply the proceeds of the sale as follows:

(a) to the repayment of the sum paid to the secured party, with interest from the date of such payment; and

(b) the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

(2) In the event the property is sold under execution, such creditor shall be required to deliver to the debtor the security agreement and any note or other evidence of indebtedness secured thereby obtained from the secured party when the property is sold for the amount of the indebtedness under the security agreement or an amount in excess thereof.

25-13-713. Procedure when sale invalidated, revival of judgment. (1) If the purchaser of real property sold on execution or his successor in interest be evicted therefrom in consequence of irregularities in the proceedings concerning the sale or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor.

(2) If the purchaser of property at sheriffs sale or his successor in interest fail to recover possession in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original

judgment bore. When so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, bearing interest as aforesaid; and any other or after-acquired property, rents, issues, or profits of the said debtor shall be liable to levy and sale under execution in satisfaction of such debt, but no property of such debtor sold bona fide before the filing of such petition shall be subject to the lien of said judgment. The notice of the filing of such petition shall be made by filing a notice thereof in the office of the county clerk where such property may be situated, and said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest.

25-13-714. Validation of defective judicial sales. All judicial sales of real property prior to January 1, 1973, provided no action is pending on July 1,1973, to set such sale aside, where made in this state on proceedings to satisfy valid judgments or decrees of any court and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such sale and, when no such deed has been executed, shall entitle such purchaser to such deed; and such deed, if now or when executed, shall be sufficient to convey all the title of the judgment debtor at the time of such sale in the premises so sold to the purchaser at said sale, and all defects or irregularities in the issuance of execution, the manner of making or conducting the sale, or the recitals or references in such deed shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

CHAPTER 14

PROCEEDINGS IN AID OF EXECUTION

Part 1—Proceedings to Determine Availability of Property

25-14-101. Debtor to answer concerning his property when execution unsatisfied.
25-14-102. Procedure when debtor withholding property from execution, arrest.
25-14-103. Debtors of judgment debtor and those holding his property to answer.
25-14-104. Procedure when debt to or ownership of judgment debtor denied.
25-14-105. Requiring witnesses to testify.
25-14-106. Immunity of witnesses to criminal proceedings.
25-14-107. Order to apply property to satisfaction of judgment.
25-14-108. Contempt to disobey referee's orders.

Part 2—Appointment of a Receiver

25-14-201. Appointment of a receiver—notice.
25-14-202. Order appointing receiver to be filed.
25-14-203. Oath and undertaking.
25-14-204. When property vests in receiver.
25-14-205. Relation back of receiver's title.

Part 3—Discharge of Imprisoned Judgment Debtor

25-14-301. Persons imprisoned to be discharged.
25-14-302. Notice of application for discharge.
25-14-303. Service of notice.
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25-14-308. Reapplication for discharge.
25-14-309. Effect of discharge.
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25-14-311. Discharge at instance of plaintiff.
25-14-312. Discharge upon failure of plaintiff to advance money for support of prisoner.

Part 1

Proceedings to Determine Availability of Property

25-14-101. Debtor to answer concerning his property when execution unsatisfied. When an execution against property of the judgment debtor or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or, if he does not reside in this state, to the sheriff of the county where the judgment is docketed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court requiring such judgment debtor to appear and answer concerning his property before such judge or a referee appointed by him at a time and place specified in the order; but no judgment debtor who is a resident may be required to attend before a judge or referee out of the county in which he resides.

25-14-102. Procedure when debtor withholding property from execution, arrest. (1) After the issuing of an execution against property and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge or a referee appointed by him to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution.

(2) Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor or his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking with sufficient surety that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.

25-14-103. Debtors of judgment debtor and those holding his property to answer. After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment, or upon proof, by affidavit or otherwise, to the satisfaction of the judge that any person or corporation has property of such judgment debtor or is indebted to him in an amount exceeding $50, the judge may, by an order, require such person or corporation or any officer or member thereof to appear at a specified time and place before him or a referee appointed by him and answer concerning the same.

25-14-104. Procedure when debt to or ownership of judgment debtor denied. If it appear that a person or corporation alleged to have property of the judgment debtor or to be indebted to him claims an interest in the property adverse to him or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same

or the court in which the action is brought, at any time, upon such terms as may be just.

25-14-105. Requiring witnesses to testify. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under parts 1 and 2 of this chapter, in the same manner as upon the trial of an issue.

25-14-106. Immunity of witnesses to criminal proceedings. A party or witness examined in proceedings authorized by parts 1 and 2 of this chapter is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud or to prove that he has been a party or privy to or knowing of a conveyance, assignment, transfer, or other disposition of property for any purpose or that he or any other person claims to be entitled, as against the judgment creditor or a receiver appointed or to be appointed in the proceedings, to hold property derived from or through the judgment debtor or to be discharged from the payment of a debt which was due to the judgment debtor or to a person in his behalf But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding.

25-14-107. Order to apply property to satisfaction of judgment. The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

25-14-108. Contempt to disobey referee's orders. If any person, party, or witness disobey an order of the referee, properly made in the proceedings before him under parts 1 and 2 of this chapter, he may be punished by the court or judge ordering the reference for a contempt.

APPENDIX H

MONTANA THIRTEENTH JUDICIAL
DISTRICT COURT, STILLWATER COUNTY

RUSSELL EDWARD DORWART and
HARRY DORWART,
Plaintiffs,

vs.

PAUL CARAWAY, individually, and as a deputy in the
Stillwater County Sheriff's Office;
DANNY AMES, individually, and as a deputy in the
Stillwater County Sheriff's Office;
CLIFF BROPHY, individually, and as Sheriff of
Stillwater County, Montana; and
COUNTY OF STILLWATER, State of Montana,
Defendants.

Complaint and Demand for Jury Trial
Cause No. DV 93-39—Judge Maurice R. Colberg, Jr.

COME NOW Russell Edward Dorwart and Harry Dorwart, through counsel Gary R. Thomas, and complain and allege as follows:

I.

INTRODUCTION

1. This is a complaint for money damages against defendants for violations of plaintiffs' constitutional and common law rights. Plaintiff Russell Edward Dorwart was renting his residence near Absarokee, Montana from plaintiff Harry Dorwart, the owner of the property. Plaintiffs allege that the individually named deputy sheriffs, Paul Caraway and Danny Ames, unlawfully entered plaintiff Russell Edward Dorwart's residence while no one else was present and conducted unlawful and unreason-

able searches and seizures, trespassed on plaintiffs' property, invaded plaintiff Russell Edward Dorwart's privacy, wrongfully converted plaintiff Russell Edward Dorwart's property, and violated plaintiff Russell Edward Dorwart's state and federal constitutional rights. Cliff Brophy and Stillwater County, Montana, are vicariously liable under state law for the actions and omissions of the deputy sheriffs under the doctrine of respondeat superior, and they are directly liable under state law for the actions and omissions of the deputy sheriffs due to their negligent supervision of the deputy sheriffs. Cliff Brophy and Stillwater County, Montana are liable under federal law for the actions and omissions of the deputy sheriffs due to their grossly negligent supervision of the deputy sheriffs amounting to deliberate indifference to plaintiff's rights and well-being.

2. This action is brought pursuant to the Montana Tort Claims Act, § 2-9-101, et. seq., Montana Code Annotated, Article II, §§ 10, 11 and 17 of the Constitution of the State of Montana, 42 United States Code § 1983, and the Fourth and Fourteenth Amendments to the United States Constitution. Jurisdiction lies within this Court pursuant to § 2-9-311 and § 3-5-302, MCA, and Article VII, Section 4 of the Constitution of the State of Montana.

II.

PARTIES

3. Plaintiff Russell Edward Dorwart is and at all times relevant herein was a citizen of the United States of America and a resident of Stillwater County, Montana.

4. Plaintiff Harry Dorwart is and at all time relevant herein was a citizen of the United States of America and was owner of the property where plaintiff Russell Edward Dorwart was residing.

5. Defendant Stillwater County, Montana, is a local government unit, organized under the laws of the State of Montana.

6. Defendant Cliff Brophy is and at all times relevant herein was the Sheriff of Stillwater County, Montana.

7. Defendant Paul Caraway is and at all times relevant herein was a deputy sheriff of Stillwater County, Montana, with the rank of sergeant.

8. Defendant Danny Ames is and at all times relevant herein was a deputy sheriff of Stillwater County, Montana, with the rank of undersheriff.

III.

GENERAL ALLEGATIONS

9. At all times mentioned herein, defendants Paul Caraway and Danny Ames were acting within the course and scope of their employment as deputy sheriffs of Stillwater County, Montana.

10. At all times mentioned herein, defendants Paul Caraway and Danny Ames acted under color of law, to wit, under the color of statutes, ordinances, regulations, policies, customs and usages of the State of Montana and/or Stillwater County, Montana.

11. At all times mentioned herein defendant Cliff Brophy acted within the course and scope of his employment as sheriff of Stillwater County, Montana.

12. At all times mentioned herein, defendant Cliff Brophy acted under color of law, to wit, under the color of statutes, ordinances, regulations, policies, customs and usages of the State of Montana and/or Stillwater County, Montana.

13. During all times mentioned in this Complaint, defendants Paul Caraway and Danny Ames and each of them separately and in concert, engaged in acts and omissions which constituted deprivation of the constitutional rights, privileges and immunities of the plaintiff Russell Edward Dorwart, and while these acts

were carried out under color of law, they had no justification nor excuse in law and were instead illegal, improper and unrelated to any activity in which law enforcement officers may appropriately and legally engage in the course of their duties.

STATE LAW CLAIMS

IV.

FIRST CAUSE OF ACTION

VIOLATION OF THE RIGHT OF PRIVACY

14. On or about April 11, 1991, defendants Paul Caraway and Danny Ames entered plaintiff Russell Edward Dorwart's residence near Absarokee, Montana, while no one else was home, engaged in a search of the residence and its various rooms, contents, under beds, and elsewhere on the premises.

15. The search described above was done without a warrant, without the consent of either plaintiff, without probable cause, and was unlawful.

16. During the search described above, defendants Paul Caraway and Danny Ames seized and removed numerous items of personal property belonging to plaintiff Russell Edward Dorwart and others.

17. The seizures described above were done without consent of either plaintiff or the other owners of the property, without a warrant, and were unlawful.

18. Such entry into plaintiff Russell Edward Dorwart's home, searching throughout the home, and the seizure of his and others property constituted an illegal invasion of plaintiff Russell Edward Dorwart's home, and a violation of his right of privacy guaranteed to him under Article II, Section 10 of the Constitution of the State of Montana.

19. As a direct and proximate result of the actions, omissions and violations described above, plaintiff Russell Edward Dorwart was subjected to extreme humiliation, has lost sleep, become apprehensive and fearful, has generally lost peace of mind and suffered and suffers undue mental anguish and severe mental and emotional distress.

20. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is entitled to punitive damages for said conduct.

V.

SECOND CAUSE OF ACTION

ILLEGAL SEARCH AND SEIZURE

21. The allegations of parts 1 through 20 above are realleged here as if fully set forth.

22. The actions of defendants Paul Caraway and Danny Ames described above were in violation of plaintiff Russell Edward Dorwart's right to be secure in his home from unreasonable searches and seizures guaranteed to him by Article II, Section 11 of the Constitution of the State of Montana.

23. As a direct and proximate result of the actions described above, plaintiff Russell Edward Dorwart incurred attorney's fees in the recovery of his property and suffered loss of the use and enjoyment of his property, embarrassment, humiliation, anxiety, apprehension, and severe emotional and mental distress.

24. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is entitled to punitive damages for said conduct.

VI.

THIRD CAUSE OF ACTION

VIOLATION OF RIGHT OF DUE PROCESS

25. The allegations of parts 1 through 24 above are realleged here as if fully set forth.

26. The actions of defendants Paul Caraway and Danny Ames described above violate plaintiff Russell Edward Dorwart's right to not be deprived of property without due process of law guaranteed to him by Article II, Section 17 of the Constitution of the State of Montana.

27. As a result of the actions complained of above, plaintiff Russell Edward Dorwart incurred attorney's fees in the recovery of his property and suffered embarrassment, humiliation, loss of enjoyment and use of his property, mental and emotional anxiety and apprehension.

28. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is thus entitled to punitive damages.

VII.

FOURTH CAUSE OF ACTION

TRESPASS

29. The allegations of parts 1 through 28 are realleged here as if fully set forth.

30. The actions of defendants Paul Caraway and Danny Ames described above constitute trespass against plaintiff Russell Edward Dorwart under the laws of the State of Montana.

31. As a direct and proximate result of the actions described above, plaintiff Russell Edward Dorwart has suffered damages in an amount to be determined at trial.

32. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is entitled to punitive damages for said conduct.

VIII.

FIFTH CAUSE OF ACTION

CONVERSION

33. The allegations of parts 1 through 32 above are realleged here as if fully set forth.

34. The actions of defendants Paul Caraway and Danny Ames described above constitute conversion of plaintiff Russell Edward Dorwart's property under the laws of the State of Montana.

35. As a direct and proximate result of the actions described above, plaintiff Russell Edward Dorwart suffered the loss of the use and enjoyment of his property and incurred attorney's fees in recovering his property, and thus was damaged in an amount to be determined at trial.

36. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is thus entitled to punitive damages.

IX.

SIXTH CAUSE OF ACTION

NEGLIGENT SUPERVISION

37. The allegations in part 1 through 36 above are realleged here as if fully set forth.

38. At all times mentioned herein, it was the duty of defendants Cliff Brophy and Stillwater County, Montana, to maintain proper and adequate supervision of defendants Paul Caraway and Danny Ames, and to use reasonable care in doing so, so that Caraway and Ames would not violate constitutional and common law rights of the plaintiffs and others.

38. Defendants Cliff Brophy and Stillwater County, Montana, and each of them separately neglected and failed to use reasonable care in maintaining proper and adequate supervision of defendants Paul Caraway and Danny Ames.

39. As a direct and proximate result of the negligence and failure of Cliff Brophy and Stillwater County described above, defendants Caraway and Ames committed the actions and omissions described above, causing plaintiff Russell Edward Dorwart to suffer the damages described above.

X.

SEVENTH CAUSE OF ACTION

TRESPASS AGAINST OWNER

40. The allegations in parts 1 through 39 above are realleged here as if fully set forth.

41. At all times mentioned herein, plaintiff Harry Dorwart was the owner of the property near Absarokee, Montana, where plaintiff Russell Edward Dorwart was residing.

42. The actions of defendants Paul Caraway and Danny Ames described above constitute trespass against Harry Dorwart under the laws of the State of Montana.

43. As a direct and proximate result of the actions described above, plaintiff Harry Dorwart has suffered damages in an amount to be determined at trial.

44. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Harry Dorwart is entitled to punitive damages for said conduct.

XI.

OTHER LIABILITY OF STILLWATER COUNTY

45. The allegations in parts 1 through 44 above are realleged here as if fully set forth.

46. Defendant Stillwater County is vicariously liable to plaintiffs under the causes of action described above, under the doctrine of respondeat superior.

FEDERAL LAW CLAIMS

VIOLATION OF RIGHTS UNDER UNITED STATES CONSTITUTION

XII.

EIGHTH CAUSE OF ACTION

UNREASONABLE SEARCH AND SEIZURE

47. The allegations in parts 1 through 46 are realleged here as if fully set forth.

48. This action is brought pursuant to 42 United States Code § 1983 and § 1988 and the Fourth and Fourteenth Amendments

to the United States Constitution to redress the deprivation by defendants under color of state law, of rights, privileges and immunities secured by the statutes and the Constitution of the United States of America. Specifically, plaintiff Russell Edward Dorwart alleges that defendants herein, and each of them, acting under color of state law, and acting recklessly and in a grossly negligent manner amounting to deliberate indifference to plaintiff's rights, privileges and immunities, violated plaintiff's rights to be free from unreasonable searches and seizures.

49. As a result of the actions and omissions described above, plaintiff Russell Edward Dorwart's rights under the Fourth Amendment to the United States Constitution were violated in that he was subjected to an unreasonable search and seizure.

50. As a direct and proximate result of the actions and omissions described above, plaintiff Russell Edward Dorwart suffered humiliation, anxiety, fear, apprehension, loss of sleep, fear, embarrassment, and severe mental and emotional distress and anguish.

51. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, with reckless disregard and deliberate and callous indifference to plaintiff Russell Edward Dorwart's constitutional rights, and he is thus entitled to punitive damages.

XIII.

NINTH CAUSE OF ACTION

VIOLATION OF DUE PROCESS OF LAW

52. The allegations in parts 1 through 51 above are realleged here as if fully set forth.

53. This action is brought pursuant to 42 United States Code § 1983 and § 1988 and the Fourteenth Amendment to the United States Constitution to redress the deprivation by defendants

under color of state law, of rights, privileges and immunities secured by the statutes and the Constitution of the United States of America. Specifically, plaintiff Russell Edward Dorwart alleges that defendants herein, and each of them, acting under color of state law, and acting recklessly and in a grossly negligent manner amounting to deliberate indifference to his rights, privileges and immunities, violated his right to be free from deprivation of property without due process of law.

54. As a result of the actions and omissions described above, plaintiff Russell Edward Dorwart's rights under the Fourteenth Amendment to the United States Constitution was violated in that he was deprived of property without due process of law.

55. As a direct and proximate result of the actions and omissions described above, plaintiff Russell Edward Dorwart incurred attorney's fees in recovering his property, suffered loss of use and enjoyment of his property and humiliation, anxiety, fear, apprehension, loss of sleep, fear, embarrassment, and severe mental and emotional distress and anguish.

56. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, with reckless disregard and deliberate and callous indifference to plaintiff Russell Edward Dorwart's constitutional rights, and plaintiff Russell Edward Dorwart is thus entitled to punitive damages.

XIV.

ATTORNEY'S FEES

57. The allegations in parts 1 through 56 above are realleged here as if fully set forth.

58. Plaintiff Russell Edward Dorwart is entitled to an award of attorney's fees on the state law claims described above, pursuant to § 2-9-314, MCA.

59. Plaintiff Russell Edward Dorwart is entitled to an award of attorney's fees on the federal law claims, pursuant to 42 U.S.C. § 1988.

WHEREFORE, plaintiffs Russell Edward Dorwart and Harry Dorwart demand judgment against the defendants, and each of them jointly and severally, in am amount which the jury shall consider to be fair and just; and plaintiffs demand judgment for punitive damages against the defendants Paul Caraway and Danny Ames under the state law claims, and plaintiff Russell Edward Dorwart demands judgment for punitive damages against all of the defendants, jointly and severally, under the federal law claims; and plaintiff Russell Edward Dorwart demands judgment for attorney's fees and costs under both the state law and federal law claims; and for such other and further relief as may be deemed just.

Dated the 2nd day of April, 1993.

THOMAS LAW OFFICE, P.C.

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APPENDIX I

MONTANA THIRTEENTH JUDICIAL
DISTRICT COURT, STILLWATER COUNTY

RUSSELL EDWARD DORWART and
HARRY DORWART,
Plaintiffs,

vs.

PAUL CARAWAY, individually, and as a deputy in the
Stillwater County Sheriff's Office;
DANNY AMES, individually, and as a deputy in the
Stillwater County Sheriff's Office;
CLIFF BROPHY, individually, and as Sheriff of
Stillwater County, Montana; and
COUNTY OF STILLWATER, State of Montana,
Defendants.

First Amended Complaint and Demand for Jury Trial
Cause No. DV 93-39—Judge Maurice R. Colberg, Jr.

COME NOW Russell Edward Dorwart and Harry Dorwart, through counsel Gary R. Thomas, and for their First Amended Complaint, complain and allege as follows:

I.

INTRODUCTION

1. This is a complaint for money damages against defendants for violations of plaintiffs' constitutional and common law rights. Plaintiff Russell Edward Dorwart was renting his residence near Absarokee, Montana from plaintiff Harry Dorwart, the owner of the property. Plaintiffs allege that the individually named deputy sheriffs, Paul Caraway and Danny Ames, unlawfully entered plaintiff Russell Edward Dorwart's residence while no one else was present and conducted unlawful and unreason-

able searches and seizures, trespassed on plaintiffs' property, invaded plaintiff Russell Edward Dorwart's privacy, wrongfully converted plaintiff Russell Edward Dorwart's property, and violated plaintiff Russell Edward Dorwart's state and federal constitutional rights. Cliff Brophy and Stillwater County, Montana, are vicariously liable under state law for the actions and omissions of the deputy sheriffs under the doctrine of respondeat superior, and they are directly liable under state law for the actions and omissions of the deputy sheriffs due to their negligent supervision of the deputy sheriffs. Cliff Brophy and Stillwater County, Montana are liable under federal law for the actions and omissions of the deputy sheriffs due to their grossly negligent supervision of the deputy sheriffs amounting to deliberate indifference to plaintiff's rights and well-being.

2. This action is brought pursuant to the Montana Tort Claims Act, § 2-9-101, et. seq., Montana Code Annotated, Article II, §§ 10, 11 and 17 of the Constitution of the State of Montana, 42 United States Code § 1983, and the Fourth and Fourteenth Amendments to the United States Constitution, and the Montana Uniform Declaratory Judgements Act, § 27-8-101, et. seq, MCA. Jurisdiction lies within this Court pursuant to § 2-9-311 and § 3-5-302, MCA, and Article VII, Section 4 of the Constitution of the State of Montana.

3. This is also an action for an injunction and a declaratory judgment to determine a question of actual controversy between the parties, that is, whether the enactment and enforcement of certain of Montana's post-judgment execution statutes is in violation of Article II, Section 17 of the Constitution of the State of Montana and of the Fourteenth Amendment to the Constitution of the United States, on the basis that they (a) fail to require adequate notice to a judgment creditor with respect to seizures of exempt property, (b) fail to provide sufficient notice of state property exemptions, (c) fail to provide a means for asserting exemption rights, (d) fail to require notice of the means for

asserting exemption rights, and (e) fail to require a prompt hearing to resolve exemption claims.

II.

PARTIES

3. Plaintiff Russell Edward Dorwart is and at all times relevant herein was a citizen of the United States of America and a resident of Stillwater County, Montana.

4. Plaintiff Harry Dorwart is and at all time relevant herein was a citizen of the United States of America and was owner of the property where plaintiff Russell Edward Dorwart was residing.

5. Defendant Stillwater County, Montana, is a local government unit, organized under the laws of the State of Montana.

6. Defendant Cliff Brophy is and at all times relevant herein was the Sheriff of Stillwater County, Montana.

7. Defendant Paul Caraway is and at all times relevant herein was a deputy sheriff of Stillwater County, Montana, with the rank of sergeant.

8. Defendant Danny Ames is and at all times relevant herein was a deputy sheriff of Stillwater County, Montana, with the rank of undersheriff.

III.

GENERAL ALLEGATIONS

9. At all times mentioned herein, defendants Paul Caraway and Danny Ames were acting within the course and scope of their employment as deputy sheriffs of Stillwater County, Montana.

10. At all times mentioned herein, defendants Paul Caraway and Danny Ames acted under color of law, to wit, under the color of statutes, ordinances, regulations, policies, customs and usages of the State of Montana and/or Stillwater County, Montana.

11. At all times mentioned herein defendant Cliff Brophy acted within the course and scope of his employment as sheriff of Stillwater County, Montana.

12. At all times mentioned herein, defendant Cliff Brophy acted under color of law, to wit, under the color of statutes, ordinances, regulations, policies, customs and usages of the State of Montana and/or Stillwater County, Montana.

13. During all times mentioned in this Complaint, defendants Paul Caraway and Danny Ames and each of them separately and in concert, engaged in acts and omissions which constituted deprivation of the constitutional rights, privileges and immunities of the plaintiff Russell Edward Dorwart, and while these acts were carried out under color of law, they had no justification nor excuse in law and were instead illegal, improper and unrelated to any activity in which law enforcement officers may appropriately and legally engage in the course of their duties.

STATE LAW CLAIMS

IV.

FIRST CAUSE OF ACTION

VIOLATION OF THE RIGHT OF PRIVACY

14. On or about April 11, 1991, defendants Paul Caraway and Danny Ames entered plaintiff Russell Edward Dorwart's residence near Absarokee, Montana, while no one else was home, engaged in a search of the residence and its various rooms, contents, under beds, and elsewhere on the premises.

15. The search described above was done without a warrant, without the consent of either plaintiff, without probable cause, and was unlawful.

16. During the search described above, defendants Paul Caraway and Danny Ames seized and removed numerous items

of personal property belonging to plaintiff Russell Edward Dorwart and others.

17. The seizures described above were done without consent of either plaintiff or the other owners of the property, without a warrant, and were unlawful.

18. Such entry into plaintiff Russell Edward Dorwart's home, searching throughout the home, and the seizure of his and others property constituted an illegal invasion of plaintiff Russell Edward Dorwart's home, and a violation of his right of privacy guaranteed to him under Article II, Section 10 of the Constitution of the State of Montana.

19. As a direct and proximate result of the actions, omissions and violations described above, plaintiff Russell Edward Dorwart was subjected to extreme humiliation, has lost sleep, become apprehensive and fearful, has generally lost peace of mind and suffered and suffers undue mental anguish and severe mental and emotional distress.

20. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is entitled to punitive damages for said conduct.

V.

SECOND CAUSE OF ACTION

ILLEGAL SEARCH AND SEIZURE

21. The allegations of parts 1 through 20 above are realleged here as if fully set forth.

22. The actions of defendants Paul Caraway and Danny Ames described above were in violation of plaintiff Russell Edward Dorwart's right to be secure in his home from unreason-

able searches and seizures guaranteed to him by Article II, Section 11 of the Constitution of the State of Montana.

23. As a direct and proximate result of the actions described above, plaintiff Russell Edward Dorwart incurred attorney's fees in the recovery of his property and suffered loss of the use and enjoyment of his property, embarrassment, humiliation, anxiety, apprehension, and severe emotional and mental distress.

24. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is entitled to punitive damages for said conduct.

VI.

THIRD CAUSE OF ACTION

VIOLATION OF RIGHT OF DUE PROCESS

25. The allegations of parts 1 through 24 above are realleged here as if fully set forth.

26. The actions of defendants Paul Caraway and Danny Ames described above violate plaintiff Russell Edward Dorwart's right to not be deprived of property without due process of law guaranteed to him by Article II, Section 17 of the Constitution of the State of Montana.

27. As a result of the actions complained of above, plaintiff Russell Edward Dorwart incurred attorney's fees in the recovery of his property and suffered embarrassment, humiliation, loss of enjoyment and use of his property, mental and emotional anxiety and apprehension.

28. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is thus entitled to punitive damages.

VII.

FOURTH CAUSE OF ACTION

TRESPASS

29. The allegations of parts 1 through 28 are realleged here as if fully set forth.

30. The actions of defendants Paul Caraway and Danny Ames described above constitute trespass against plaintiff Russell Edward Dorwart under the laws of the State of Montana.

31. As a direct and proximate result of the actions described above, plaintiff Russell Edward Dorwart has suffered damages in an amount to be determined at trial.

32. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is entitled to punitive damages for said conduct.

VIII.

FIFTH CAUSE OF ACTION

CONVERSION

33. The allegations of parts 1 through 32 above are realleged here as if fully set forth.

34. The actions of defendants Paul Caraway and Danny Ames described above constitute conversion of plaintiff Russell Edward Dorwart's property under the laws of the State of Montana.

35. As a direct and proximate result of the actions described above, plaintiff Russell Edward Dorwart suffered the loss of the use and enjoyment of his property and incurred attorney's fees in recovering his property, and thus was damaged in an amount to be determined at trial.

36. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Russell Edward Dorwart is thus entitled to punitive damages.

IX.

SIXTH CAUSE OF ACTION

NEGLIGENT SUPERVISION

37. The allegations in part 1 through 36 above are realleged here as if fully set forth.

38. At all times mentioned herein, it was the duty of defendants Cliff Brophy and Stillwater County, Montana, to maintain proper and adequate supervision of defendants Paul Caraway and Danny Ames, and to use reasonable care in doing so, so that Caraway and Ames would not violate constitutional and common law rights of the plaintiffs and others.

38. Defendants Cliff Brophy and Stillwater County, Montana, and each of them separately neglected and failed to use reasonable care in maintaining proper and adequate supervision of defendants Paul Caraway and Danny Ames.

39. As a direct and proximate result of the negligence and failure of Cliff Brophy and Stillwater County described above, defendants Caraway and Ames committed the actions and omissions described above, causing plaintiff Russell Edward Dorwart to suffer the damages described above.

X.

SEVENTH CAUSE OF ACTION

TRESPASS AGAINST OWNER

40. The allegations in parts 1 through 39 above are realleged here as if fully set forth.

41. At all times mentioned herein, plaintiff Harry Dorwart was the owner of the property near Absarokee, Montana, where plaintiff Russell Edward Dorwart was residing.

42. The actions of defendants Paul Caraway and Danny Ames described above constitute trespass against Harry Dorwart under the laws of the State of Montana.

43. As a direct and proximate result of the actions described above, plaintiff Harry Dorwart has suffered damages in an amount to be determined at trial.

44. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, and plaintiff Harry Dorwart is entitled to punitive damages for said conduct.

XI.

OTHER LIABILITY OF STILLWATER COUNTY

45. The allegations in parts l through 44 above are realleged here as if fully set forth.

46. Defendant Stillwater County is vicariously liable to plaintiffs under the causes of action described above, under the doctrine of respondeat superior.

FEDERAL LAW CLAIMS

VIOLATION OF RIGHTS UNDER UNITED STATES CONSTITUTION

XII.

EIGHTH CAUSE OF ACTION

UNREASONABLE SEARCH AND SEIZURE

47. The allegations in parts l through 46 are realleged here as if fully set forth.

48. This action is brought pursuant to 42 United States Code § 1983 and § 1988 and the Fourth and Fourteenth Amendments to the United States Constitution to redress the deprivation by defendants under color of state law, of rights, privileges and immunities secured by the statutes and the Constitution of the United States of America. Specifically, plaintiff Russell Edward Dorwart alleges that defendants herein, and each of them, acting under color of state law, and acting recklessly and in a grossly negligent manner amounting to deliberate indifference to plaintiff's rights, privileges and immunities, violated plaintiff's rights to be free from unreasonable searches and seizures.

49. As a result of the actions and omissions described above, plaintiff Russell Edward Dorwart's rights under the Fourth Amendment to the United States Constitution were violated in that he was subjected to an unreasonable search and seizure.

50. As a direct and proximate result of the actions and omissions described above, plaintiff Russell Edward Dorwart suffered humiliation, anxiety, fear, apprehension, loss of sleep, fear, embarrassment, and severe mental and emotional distress and anguish.

51. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, with reckless disregard and deliberate and callous indifference to plaintiff Russell Edward Dorwart's constitutional rights, and he is thus entitled to punitive damages.

XIII.

NINTH CAUSE OF ACTION

VIOLATION OF DUE PROCESS OF LAW

52. The allegations in parts 1 through 51 above are realleged here as if fully set forth.

53. This action is brought pursuant to 42 United States Code § 1983 and § 1988 and the Fourteenth Amendment to the United States Constitution to redress the deprivation by defendants under color of state law, of rights, privileges and immunities secured by the statutes and the Constitution of the United States of America. Specifically, plaintiff Russell Edward Dorwart alleges that defendants herein, and each of them, acting under color of state law, and acting recklessly and in a grossly negligent manner amounting to deliberate indifference to his rights, privileges and immunities, violated his right to be free from deprivation of property without due process of law.

54. As a result of the actions and omissions described above, plaintiff Russell Edward Dorwart's rights under the Fourteenth Amendment to the United States Constitution was violated in that he was deprived of property without due process of law.

55. As a direct and proximate result of the actions and omissions described above, plaintiff Russell Edward Dorwart incurred attorney's fees in recovering his property, suffered loss of use and enjoyment of his property and humiliation, anxiety, fear, apprehension, loss of sleep, fear, embarrassment, and severe mental and emotional distress and anguish.

56. The actions of defendants Paul Caraway and Danny Ames described above were done wilfully and maliciously, with reckless disregard and deliberate and callous indifference to plaintiff Russell Edward Dorwart's constitutional rights, and plaintiff Russell Edward Dorwart is thus entitled to punitive damages.

XIV.

TENTH CAUSE OF ACTION

ACTION FOR DECLARATORY JUDGMENT AND INJUNCTION

57. The allegations in parts 1 through 56 above are realleged here as if fully set forth.

58. Under Montana law, certain property of judgment debtors is exempt from execution, as stated at § 25-13-501, MCA. These exemptions are found at §§ 25-13-610 through 614, MCA.

59. By creating exemptions from execution, Montana granted judgment debtors a vested property interest in retaining their exempt property, which property interest is sufficient to provide judgment debtors with due process protections debtors with due process protections.

60. Defendants seized property of Plaintiff Russell Edward Dorwart under the purported authority of two Writs of Execution, issued by the Justice Court of Stillwater County, Montana. Copies of these two Writs of Execution are attached hereto as Exhibits "A" and "B". These Writs of Execution were issued pursuant to Montana's post judgment execution statues which are challenged herein.

61. The property of Plaintiff Russell Edward Dorwart seized by Defendants Caraway and Ames as alleged above was exempt from execution under Montana law.

62. Plaintiff Russell Edward Dorwart has a vested property interest in all of his property which is exempt from execution under Montana law, and this property interest is sufficient to provide Russell Edward Dorwart with due process protections, including the right to notice and a hearing.

63. In their seizure of Plaintiff Russell Edward Dorwart's exempt property, the Defendants (a) failed to provide any notice to Russell Edward Dorwart that any exemptions were available to him in respect to property seized under Writs of Execution, (b) failed to provide any notice of any means for asserting exemption rights, and (c) failed to provide a prompt hearing to resolve his exemption rights, all in violation of Plaintiff Russell Edward Dorwart's right to due process of law.

64. Montana's statutes regarding post judgment seizures of property to satisfy judgments (a) fail to require adequate notice to a judgment creditor, including Plaintiff Russell Edward Dorwart, with respect to seizures of exempt property, (b) fail to provide sufficient notice, or any notice, of the state property exemptions, (c) fail to provide sufficient means, or any means, for asserting exemption rights, (d) fail to require notice of the means for asserting exemption rights, and (e) fail to require a prompt hearing to resolve exemption claims, all in violation of Plaintiff Russell Edward Dorwart's right to due process of law.

65. Montana's post judgment execution statutes and statutory scheme, found generally at §§ 25-13-201 through 25-13-701, MCA, are illegal and violate the Fourteenth Amendment of the Constitution of the United States and Article II, Section 17 of the Constitution of the State of Montana, for the reasons stated above.

66. Plaintiff Russell Edward Dorwart has suffered irreparable injury in the past, is suffering at present and is threatened with irreparable injury in the future, by reason of the acts complained of herein. He has no adequate remedy at law to redress such wrongs and illegal acts.

XV.

ELEVENTH CAUSE OF ACTION

STATUTES UNCONSTITUTIONAL AS APPLIED

67. Parts 1 through 66 above are realleged here as if fully set forth.

68. As alleged above, under apparent authority of certain of Montana's post judgment execution statues, Defendants Caraway and Ames entered the residence of Plaintiff Russell Edward Dorwart, without a warrant or consent, searched the residence, and seized personal property belonging to Plaintiff Russell Edward Dorwart and others.

69. To the extent that Montana's post judgment execution statutes allow the warrantless, non-consensual entry, search and seizure of Plaintiff Russell Edward Dorwart's residence and property in order to find and seize property under Writs of Execution, as complained of above, those statues are illegal and unconstitutional as applied to Plaintiff Russell Edward Dorwart, in that they violate the Fourth Amendment to the Constitution of the United States and Article II, Sections 10 and 11 of the Constitution of the State of Montana, in that said statutes allow and allowed illegal invasions of the privacy of Plaintiff Russell Edward Dorwart, and also allow and allowed unreasonable searches and seizures of the residence and property of Plaintiff Russell Edward Dorwart.

70. Plaintiff Russell Edward Dorwart has suffered irreparable injury in the past and is threatened with irreparable injury in the future, by reason of the acts complained of herein. He has no adequate remedy at law to redress such wrongs and illegal acts.

XIV.

ATTORNEY'S FEES

71. The allegations in parts 1 through 56 above are realleged here as if fully set forth.

72. Plaintiff Russell Edward Dorwart is entitled to an award of attorney's fees on the state law claims described above, pursuant to § 2-9-314, MCA.

73. Plaintiff Russell Edward Dorwart is entitled to an award of attorney's fees on the federal law claims, pursuant to 42 U.S.C. § 1988.

WHEREFORE, plaintiffs Russell Edward Dorwart and Harry Dorwart demand judgment against the defendants, and each of them jointly and severally, in am amount which the jury shall consider to be fair and just; and plaintiffs demand judgment for punitive damages against the defendants Paul Caraway and Danny Ames under the state law claims, and plaintiff Russell Edward Dorwart demands judgment for punitive damages against all of the defendants, jointly and severally, under the federal law claims; and plaintiff Russell Edward Dorwart demands judgment for attorney's fees and costs under both the state law and federal law claims; and for such other and further relief as may be deemed just; and,

PLAINTIFFS FURTHER PRAY that the Court declare the rights and legal relations of the parties to the subject matter here in controversy, and that the Court declare that Montana's post judgment execution statutes and statutory scheme to be in violation of the Fourteenth Amendment to the Constitution of the United States and Article II, Section 17 of the Constitution of the State of Montana; and that the Court enjoin the defendants, their agents, servants, employees and attorneys, and all persons in active concert and participation with them, permanently, from (a) failing to provide any notice to Russell Edward Dorwart that

any exemptions are available to him in respect to property seized under Writs of Execution, (b) failing to provide any notice of any means for asserting exemption rights, and (c) failing to provide a prompt hearing to resolve his exemption rights; and,

PLAINTIFFS FURTHER PRAY that the Court declare that Montana's post judgment execution statutes are illegal and in violation of the Fourth Amendment to the Constitution of the United States and Article II, Sections 10 and 11 of the Constitution of the State of Montana, as applied to Plaintiff Russell Edward Dorwart, and enter a permanent injunction prohibiting Defendants, their servants, agents, employees and attorneys and all persons in active concert and participation with them from warrantless, non-consensual entries and searches of Plaintiff Russell Edward Dorwart's residence, and from seizures of property within such residence after such entries and searches.

Dated the 1st day of April, 1994.

THOMAS LAW OFFICE, P.C.

By: /s/ Gary R. Thomas
Gary R. Thomas
Attorney for Plaintiffs

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand trial by jury of all issues so triable.

/s/Gary R. Thomas
Gary R. Thomas

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APPENDIX J

MONTANA THIRTEENTH JUDICIAL
DISTRICT COURT, STILLWATER COUNTY

RUSSELL EDWARD DORWART and
HARRY DORWART,

Plaintiffs,

v.

PAUL CARAWAY, individually, and as a deputy in the
Stillwater County Sheriff's Office;
DANNY AMES, individually, and as a deputy in the
Stillwater County Sheriff's Office;
CLIFF BROPHY, individually, and as Sheriff of
Stillwater County, Montana; and
COUNTY OF STILLWATER, State of Montana,

Defendants.

Plaintiff Russell Dorwart's Motion
for Partial Summary Judgment
Cause No. DV 93-39

COMES NOW PLAINTIFF RUSSELL EDWARD DORWART, and respectfully moves the Court for summary judgment as to the liability of Defendants PAUL CARAWAY AND DANNY AMES under the following causes of action alleged in Plaintiffs' Complaint:

STATE LAW CLAIMS:

1. First Cause of Action: Violation of the Right of Privacy;

2. Second Cause of Action: Illegal Search and Seizure;

3. Third Cause of Action: Violation of Right of Due Process;

4. Fourth Cause of Action: Trespass;

5. Fifth Cause of Action: Conversion;

6. Attorney's fees on the state law causes of action.

FEDERAL LAW CLAIMS:

7. Eighth Cause of Action: Unreasonable Search and Seizure;

8. Ninth Cause of Action: Violation of Due Process of Law;

9. Attorney's fees on the federal law causes of action.

This Motion is brought pursuant to Rule 56, Montana Rules of Civil Procedure, on the grounds that there are no genuine issues as to any material fact and Plaintiff RUSSELL EDWARD DORWART is entitled to a judgment as a matter of law.

This Motion is based upon the pleadings and answers to interrogatories on file herein, and is supported by the Affidavit of Russell Edward Dorwart dated October 12, 1993, filed herein, and by the Plaintiffs' Brief In Opposition To Defendants' Motion To Dismiss, Or For Summary Judgement, dated July 21, 1993, and filed herein.

Plaintiffs' counsel has conferred with Defendants' counsel Steven R. Milch, and counsel have agreed that this Motion may be considered by the Court along with its consideration of Defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment, without the necessity of any additional hearing besides the hearing set for Defendants' said Motion on October 14, 1993, and further agreed that the parties' briefs and affidavits filed in support and in opposition to Defendants' said Motion may be considered by the Court in regards to this Motion by Plaintiff RUSSELL EDWARD DORWART for summary judgment.

DATED this 13th day of October, 1993.

THOMAS LAW OFFICE, P.C.

By: /s/ Gary R. Thomas
Gary R. Thomas
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Motion For Partial Summary Judgment was served upon the following by personal delivery of a true and correct copy thereof on the 14th day of October 1993, as well as by faxing a true and correct copy on October 13, 1993, as follows:

Steven J. Lehman
Steven R. Milch
CROWLEY, HAUGHEY, HANSON, TOOLE & DIETRICH
500 Transwestern Plaza II
490 North 31st Street
P.O. Box 2529
Billings, Montana 59103-2529
Fax # 406-252-5292

/s/Helen G. MacKay
Thomas Law Office, P.C.

APPENDIX K

MONTANA THIRTEENTH JUDICIAL
DISTRICT COURT, STILLWATER COUNTY

RUSSELL EDWARD DORWART and
HARRY DORWART,

Plaintiffs,

v.

PAUL CARAWAY, individually, and as a deputy in the
Stillwater County Sheriff's Office;
DANNY AMES, individually, and as a deputy in the
Stillwater County Sheriff's Office;
CLIFF BROPHY, individually, and as Sheriff of
Stillwater County, Montana; and
COUNTY OF STILLWATER, State of Montana,

Defendants.

Notice of Appeal
Cause No. DV 93-39

NOTICE IS HEREBY GIVEN that RUSSELL EDWARD DORWART and HARRY DORWART, Plaintiffs above named, hereby appeal to the Supreme Court of the State of Montana from that portion of the District Court's Memorandum and Order herein, dated August 3, 1995, denying Plaintiffs' Motion for Summary Judgment as to Plaintiffs' First, Second, Third, Fourth, Fifth, and Eighth causes of action, finding Defendants immune from Plaintiffs' Eighth and Ninth causes of action, and Plaintiffs' claims for attorney's fees and granting Defendants' Motion For Summary Judgment as to Plaintiffs' First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth causes of action and Plaintiffs' claim for attorney's fees, all as set forth in Plaintiffs' First Amended Complaint herein. Specifically, Plaintiffs appeal

that portion of the said Memorandum and Order denying Plaintiffs' Motion For Summary Judgment on the following causes of action specified in Plaintiffs' First Amended Complaint:

1. First Cause of Action: violation of right of privacy;

2. Second Cause of Action: illegal search and seizure-state claim;

3. Third Cause of Action: violation of right of due process;

4. Fourth Cause of Action: trespass;

5. Fifth Cause of Action: conversion;

6. Eighth Cause of Action: unreasonable search and seizure-federal claim;

7. Ninth Cause of Action: violation of due process-federal claim; the finding of immunity of all of the Defendants;

8. Plaintiffs' claims for attorneys fees.

Further, specifically, Plaintiffs appeal that portion of the said Memorandum and Order granting Defendants' Motion For Summary Judgment as to the following causes of action specified in Plaintiffs' First Amended Complaint:

a. First Cause of Action: violation of right of privacy;

b. Second Cause of Action: illegal search and seizure-state claim;

c. Third Cause of Action: violation of right of due process;

d. Fourth Cause of Action: trespass;

e. Fifth Cause of Action: conversion;

f. Sixth Cause of Action: negligent supervision;

g. Seventh Cause of Action: trespass against owner;

h. Eighth Cause of Action: unreasonable search and seizure-federal claim;

i. Ninth Cause of Action: violation of due process-federal claim; the finding of immunity of all of the Defendants.

j. Plaintiffs' claims for attorneys fees.

DATED this 7th day of August, 1995.

THOMAS LAW OFFICE, P.C.

By: /s/ Gary R. Thomas
Gary R. Thomas

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